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CURRENT EVENTS.

THE BEST LAWYER.—Under this title Mr. Donovan has kindly furnished us with the sub-joined article which we doubt not will be read with much interest. Mr. Donovan is well known to the profession as a gentleman of learning and talent and the author of several very successful legal works. He says;

"I have noticed various items of interest in recent exchanges on this theme, but in none is the theory carried out to a complete conclusion. It is a common thing to speak of a lawyer as "a first class lawyer" or "a rising young" or a "third rate lawyer"—the last title is given by the fellow who has just been defeated in court by the "third rate" advocate. Some have the habit of thinking that only lawyers in large cities like New York, Philadelphia, or Chicago, get their full growth and become great lawyers; and some assume that advocates can not, of course, be learned in the law. A close reading of history will kill off most of these theories and change one's convictions materially.

A lawyer may be entirely first class of his age, and nature of his business, and age with experience should always enter into the estimate; many a man has never been tested—never been tried. But for some singular cases, Patrick Henry may have remained without a record, and Abraham Lincoln have died without a bright name as an advocate; neither enjoyed a city practice, and men like Beach Shaffer, Porter Voorheis, Waite, Carpenter and Hendricks all attained fame in reality, while country lawyers. These were not born in cities, but, like Beecher, called there. Some of the best lawyers never reach fame till after death—Ryan was one of this class, an unknown man of Wisconsin with a Websterian genius who knew the law and how to handle it.

But as was recently said in the Daily Register; to know the law is not enough to make a great lawyer. He must apply it, win by it, bring out results and enforce attention as did Seward and Webster—Choate and Tom Marshall. Great lawyers are great in genius and to underrate them, when merely advocates, is the grossest blunder. What is an advocate, but one who can urge and win his position, as did Cicero in the defense of Gavius? Like Graham at the trial of Mc Farland—Brady in the trial of Sickles—Mc Sweeney in the Gov. Scott case—Curtis in defense of Buford—Crittenden in the Ward trial, and Voorheis pleading for Mary Harris? These are a handful of the advocates who have moved their States and moulded public opinion in trials not by dry law alone—for that is mechanical, that is book-keeping, that is abstract of title work,—that is something that money will buy and pay for, but genius, sagacity, power, influence, character, eloquence and manhood are gifts of greatness inherited from the Almighty and developed by ripe experience. Great Lawyers must be good advocates. Good lawyers may be such and never be advocates, but leaders of men, and moulders of minds must be more than title searchers, precedent finders, or statute interpreters, they must be men like Webster and Gladstone who seek out the right and lead all men to believe it and follow it and create laws and govern nations. Great lawyers are greater than law itself.

J. W. DONOVAN.

BANKRUPT LAW.—Our attention has recently been called to a correspondence between Judge E. S. Hammond of the United States District Court of Tennessee and Senator George of Mississippi. We regret that the letters are too long to be reproduced in our columns. Both gentlemen favor the idea of a Bankrupt Law taken in the abstract, but neither entirely approves its developement in the concrete form of the Hoar Bill. They unite in the objection that the provisions of the bill are "too highly artificial for our circumstances outside of the great commercial cities." Senator George also says: "Another serious objection in my mind to Senator Hoar's bill is its giving increased force and vigor to the growing tendency to conduct all judicial business in Federal courts. My judgment is that, instead of

taking another step in this direction, our efforts should be to diminish the already overgrown jurisdiction of the Federal courts, and restore the litigation of the country to the State courts, where it can be as well and as fairly disposed of, and with much more economy and convenience to the people." This may be regarded as, in one sense, an outcropping of the "ancient leaven," but the fact remains nevertheless, that in consequence of the enormous growth of inter-State commerce, the jurisdiction of Federal courts has greatly increased, and is rapidly increasing; whether it ought to be diminished is a grave question for the serious consideration of statesmen and jurists. Whether the broader jurisdiction of Federal Courts be an evil or a blessing, there can be no doubt that it will be very greatly increased by the adoption of any Bankrupt Law, and that under the operation of such a law the processes of those courts will be brought home to the business of multitudes of people whose names, would never otherwise appear upon their records. Whether therefore the further increase of Federal jurisdiction is a thing to be desired, or to be deplored, it is a living issue in the consideration of a Bankrupt Law, but to discuss it as fully as it deserves would at once lead us into a political field which it would be inappropriate for us to enter. The experience of the United States in the matter of Bankrupt Laws has been singularly unfavorable to that line of legislation.

The first Bankrupt Law enacted in 1800 was repealed in 1803 having failed utterly to receive the sanction of popular approval. The second, enacted in 1841, was practically nothing more than a whitewashing measure, to enable insolvents wrecked by the currency collapse of 1837, to take a new departure, and enter upon new enterprises. The country soon demanded and obtained its repeal. The popular impression then was that men who owed debts ought to pay them, or at least to continue to owe them, and that the creditor was entitled to the benefit of all the chances of the debtor's future. The Bankrupt Law of 1867 was somewhat longer lived, but after vigorous efforts to save it by amendments, it too succumbed to popular displeasure. Each of these two latter laws was, in the main, a "relief" measure, the product of a financial emergency, designed chiefly as "a new way to pay old debts," and only partially as a permanent portion of judicial processes for the collection of debts.

From this recital it is manifest that for nearly a hundred years, Congress has possessed the power to enact Bankrupt Laws, and has never exercised it without a prompt rebuke from the people, necessitating the repeal of the law. The objections to this line of legislation which have been most seriously urged are: that the operation of any bankrupt law is cumbrous and expensive, that although courts are good instrumentalities for deciding what men's rights are, they are, to use Senator George's language "very poor ones to manage men's business;" that under any bankrupt system, the jurisdiction of the United States Courts is unduly extended; that under the voluntary clauses of the law an excellent opportunity is afforded to fraudulent debtors to extinguish their liabilities by paying little or nothing; that the retrospective action of the law, by which debtors can be discharged from debts contracted before the passage of the act is contrary to the spirit of the constitution, although clearly within its letter; that although all contracts are presumed to be made with reference to all laws in force at the time, it is not fair to presume that contracts are made with reference to the power of Congress to enact a Bankrupt Law, the exercise of which has been so rare and so transitory. If the future Bankrupt Law shall be so framed as to obviate these objections it may possibly stand the test of popular criticism and scrutiny, otherwise it will probably soon perish like its predecessors.

NOTES OF RECENT DECISIONS.

WILL — CONSTRUCTION — EXTRINSIC TESTIMONY — CONDITIONAL LIMITATIONS — CHARITABLE USES.—In the Supreme Court of Wisconsin was recently decided an interesting case involving the construction of testamentary papers, the validity of bequests to charitable uses and the operation of conditional limitations.[1] It is a little noteworth

[1] Webster v. Morris, May 27, 1886, N. W. Rep. 351

that a very elaborate testamentary paper, containing many items, disposing of a very handsome fortune, and raising several important questions, was marred by two gross mistakes, misdescribing the two objects of the testator's bounty, corporations, and raising a preliminary question as to how far the error of the scrivener would be cured by the charitable construction of the court. The will failed to designate with accuracy to which of two "Cemetery Associations" a legacy of $1,000 was bequeathed, and to describe properly a Presbyterian "Church" or "Society" to which $10,000 was given. The court, however, had no difficulty in ruling that extrinsic evidence was admissible to show which was the "Cemetery," and which the "Society," that the testator intended to endow.[2]

The question when a bequest is within the rule forbidding perpetuities seems to be this: Bequests of legacies and personal property, when the payment or distribution is to be made at a future time, certain to arrive, and not subject to a condition precedent, are deemed vested, when there is a person in being at the time of the testator's death, capable of taking when the time arrives. On the other hand, legacies payable only upon an event which may never happen, and therefore subject to a condition precedent, are contingent. Hence, the court concluded that the bequest to the church, although by the terms of the will, it was not payable until five years after the death of the testator, conferred upon the church a vested interest in the legacy, and was in every respect valid.

Whether a provision in favor of the "resident poor of the town" was sufficiently certain was also considered. It was held to be sufficiently definite.[3]

[2] State v. Timme, 56 Wis. 423; S. C. 14 N. W. Rep. 604; Begg v. Begg, 56 Wis. 534; S. C. 14 N. W. Rep. 602; Scott v. West, 63 Wis. 551; S. C. 24 N. W. Rep. 161, and 25 N. W. Rep. 18; Begg v. Anderson, 64 Wis. 207; S. C. 25 N. W. Rep. 3; Cleveland v. Burnham, 64 Wis. 355; S. C. 25 N. W. Rep. 407; *In re* Brake, 32 Moak, Eng. Rep. 601; Brownfield v. Brownfield, 51 Amer. Dec. 590; Hawkins v. Garland, 44 Amer. Rep. 158; Tilton v. American Bible Soc., 49 Amer. Rep. 321; Newell's Appeal, 24 Pa. St. 197; Minot v. Boston Asylum & F. S., 7. Metc. 416: Howard v. American P. S., 49 Me. 288; Lefevre v. Lefevre, 59 N. Y. 434; Patch v. White, 117 U. S. 210; S. C. 6 Sup. Ct. Rep. 617, 710.

[3] Howard v. American, etc. Society, 49 Me. 288; Swasey v. American Bible Soc., 57 Me. 523; McIntire v. Zanesville, 17 Ohio St. 352; Hesketh v. Murphy, 36 N. J. E. 304; State v. Griffith, 2 Del. Ch. 392; Craig v. Secrist, 54 Ind. 419; Shotwell v. Mott, 2 Sandfd. Ch. 46.

The cases on this subject are numerous, but all lead us to the conclusion that bequests of this character are sufficiently certain, if there is such a general description of the persons to be benefited, as may reasonably lead at the proper time to an identification of the particular individuals. "In trusts of this kind," says the Supreme Court of Maine,[4] "the individuals who are ultimately to be benefited are always uncertain." And in another Maine case,[5] it was held that a benefit of this description was valid, although the beneficiary was not in existence when the will was made or the testator died. It was to the "first Calvanist Baptist Society that may be organized" in a specified place.[6] In a Massachusetts case Shaw, C. J., said: "When a gift is made to found a hospital or college not in being, and which requires a future act of incorporation, the gift is nevertheless valid and the court will carry it into effect."[7] Upon abundant authority, therefore, the court held that the benefits to the cemetery company, and to the church, were valid. In this case, too, another interesting question is raised. The testator bequeathed to each of his two grandsons the sum of $10,000, upon the condition that if either of them should die, "without leaving any heir," before his legacy should be paid to him, the survivor should receive the share of the deceased. One of the grandsons did die, and the court, of course, held that his share vested in his brother, subject, however, to the conditions upon which he was to receive his own legacy. Those conditions were, that before receiving his legacy under the will, the legatee should have learned some useful trade, business or profession, and should be of good moral character. This condition, it was contended, was void, because it was *in terrorem*, and against public policy. In answer to this line of argument the court says:

"The authorities, however, seem to be

[4] Howard v. American, etc. Soc., *supra;* Bartlett v. King, 12 Mass. 537.

[5] Swasey v. American Bible Soc., 57 Me. *supra.*

[6] Atty-Gen. v. Downing, 3 Ves. Jr. 714.

[7] Sanderson v. White, 18 Pick. 336.

strongly the other way. This is on the theory that every person has a legal right to dispose of his own property as he sees fit. Thus, conditions annexed to a devise or bequest from a husband to a wife, or a wife to a husband, to be held only so long as he or she remains unmarried, are quite common, and have frequently been held valid. Allen v. Jackson, 1 Ch. Div. 399, reversing the same case in 19 Eq. Cas. 631; Pringle v. Dunkley, 53 Amer. Dec. 110; Bostick v. Blades, 59 Md. 231; S. C. 43 Amer. Rep. 548. So, conditions that the devisee or legatee shall not marry prior to arriving at a particular age, without the consent of a person named, have been held valid. Scott v. Tyler, 2 Brown, Ch. 431; Stackpole v. Beaumont, 3 Ves. Jr. 97; Hogan v. Curtin, 88 N. Y. 162; S. C. 42 Amer. Rep. 244. The age named must, of course, be reasonable; as, for instance, 21 years of age. But a condition annexed to a devise or bequest from parent to child in absolute restraint of marriage, has been held void, as against public policy. Williams v. Cowden, 13 Mo. 211; S. C. 53 Amer. Dec. 143; Randall v. Marble, 69 Me. 310; Otis v. Prince, 10 Gray, 581. The same has been held where the devise or bequest was to a widow from her husband, and there was no gift over in case of breach of the condition. Parsons v. Winslow, 6 Mass. 169; S. C. 4 Amer. Dec. 107, and notes; Crawford v. Thompson, 91 Ind. 266; S. C. 46 Amer. Rep. 598.

In Cook v. Turner, 14 Sim. 493, the will contained a gift over in case the legatee should dispute the will, or the testator's competency to make it, or should not confirm it when required by the trustees; and the condition was held valid.

In Dickson's Trust, 1 Sim. (N. S.) 37, the testator, by a codicil, annexed a condition to the bequest to his daughter to the effect that she should not take, in case she became a nun, which she did; and it was held by Lord Cransworth that the condition was lawful, notwithstanding there was no gift over on its breach.

That case was followed in Hodgson v. Halford, 11 Ch. Div. 959, S. C. 32, Moak, Eng. Rep. 918, where the condition annexed to the legacy was, in effect, that it should be forfeited in case the legatee married any person who was not a born Jew, professing the Jewish religion; and it was held valid, and not against public policy. It was there said that all the authorities holding the other way were 'cases in which the condition was unquestionably against public morality, and it was on that ground that the court declined to give effect to it.'"

There was still another question which the court found it necessary to settle. The will provides that in case the legacies to the two grandsons shall fail by the death of both of them before attaining the age of thirty years, their legacies should revert to the executors and be expended by them "for charitable purposes, or given to any of the testator's heirs as may be in need, or not in very comfortable circumstances." The first alternative for charitable purposes generally, brings up the question whether the statute of 43 Eliz. ch. 4 is in force in Wisconsin. Upon that point the court holds that the *cy pres* feature of the statute of Elizabeth is certainly not in force in Wisconsin, because the courts of that State being endowed with only "strictly judicial powers" cannot exercise such powers as are entrusted to the Lord Chancellor as keeper of the great seal. "But in so far as that statute was only confirmatory of such powers exercised by the Lord Chancellor as were strictly judicial, it became by judicial construction interwoven in, and a part of the common law of England, and to that extent is in force here."[8]

Several other questions of interest were adjudicated, which we can only notice very briefly. It is held that although a bequest of money to be used in a specified event for charitable purposes is too indefinite to be carried into effect, an alternative authority to bestow the money on "any of my heirs who are in need or not in very comfortable circumstances," is sufficiently definite and may be enforced. It was further held in this con-

[8] Vidal v. Gerard's Extrs., 2 How. 128; Howard v. American P. Soc., 49 Me. 288; Shields v. Jolly, 1 Rich. Eq. 99; S. C. 42 Amer. Dec. 349; Derby v. Derby, 4 R. I. 436; Executors of Burr v. Smith, 7 Vt. 241; McAllister v. McAllister, 46 Vt. 272; Fontain v. Ravenel, 17 How. 385 *et seq.*; Ould v. Washington H. F., 95 U. S. 303; Going v. Emery, 16 Pick. 107; S. C. 26 Amer. Dec. 645; State v. Griffith, 2 Del. Ch. 392; Miller v. Chittenden, 2 Iowa, 369 *et seq.*; Williams v. Williams, 8 N. Y. 525; Treat's Appeal, 30 Conn. 113; Williams v. Pearson, 38 Ala. 299.

nection, that if one of two alternative purposes of a gift is too indefinite to be carried into effect, the validity of the other is not thereby impaired. And further, that if a fund devoted by will to a charitable purpose is too small to accomplish the object desired, it will revert to the persons entitled to it by law; and finally that where a testator throughout his will bequeaths and treats his estate as personal property, the power of the executors to convert the realty into cash is implied.

RESTORATION OF A LOST OR SPOLIATED WILL.

To bring this discussion within prescribed limits, all questions wherein judicial *dicta* have not branched off from the law of wills in general, or which have no especial bearing upon the mode of procedure looking to the restoration of lost wills, and the admission of copies or drafts of the same to probate, will be omitted.

Jurisdiction.—It has generally been held that courts of equity have jurisdiction to establish lost and spoliated wills.[1] In Kentucky chancery takes cognizance only in case of spoliation.[2] In Ohio,[3] South Carolina,[4] Georgia,[5] Rhode Island[6] and Kansas,[7] the preliminary application for the admission to probate of a copy or draft, must be made in the probate court. In Missouri,[8] Colorado[9] and Wisconsin,[10] jurisdiction is in the county court.

[1] Adams Eq. 248, n; Hill Trustees, 151; Perry Trusts, § 183; Story Eq. Jur. § 254; Bigelow Fraud, 128; Kerr Fr. and Mistake, 275; 3 Redf. Wills, 17; Allison v. Allison, 7 Dana, 94; Bailey v. Stiles, 1 Green, Ch. 220; Buchanan v. Matlock, 8 Humpf. 390; Legare v. Ashe, 1 Bay. (S. C.) 464; Bulkley v. Redmond, 2 Bradf. (N. Y. Sur.) 281; Bowen v. Idley, 6 Paige, 46. In California and Arkansas jurisdiction is in chancery by statute.

[2] Hunt v. Hamilton, 9 Dana, 90; Campbell v. West, 3 B. Mon. 242.

[3] Morningstar v. Selby, 15 Ohio, 345.

[4] Myers v. O'Hanlon, 13 Rich. 196.

[5] Slade v. Street, 27 Ga. 17.

[6] Clarke v. Clarke, 7 R. I. 45.

[7] Rev. Stats.

[8] Jackson v. Jackson, 4 Mo. 210; Graham v. O'Fallon, 3 Mo. 507; 4 Mo. 338; Ib. 601. The Probate Court has been abolished here and its jurisdiction transferred to the County Court.

[9] Rev. Stats.

[10] Rev. Stats. The Circuit Court has concurrent jurisdiction.

Proof of Loss.—There is no difference between the rules of evidence applicable to the case of a lost will, and those governing the re-production of any other lost instrument.[11] Therefore the first step in the proceeding now under consideration, is to prove the loss of the original.[12] It is to be established that diligent but unsuccessful search has been made in all places where the document was most likely to be found.[13]

Proof of Execution.—As in the case of an existing will offered for probate, so if the will be lost, due execution must be proven.[14] But it is to be noticed that courts have not required that this proof be stringent. Thus the testimony of a single witness has been deemed sufficient,[15] and wills have been admitted to probate, against the oath of a subscribing witness, that the legal formalities were not complied with by the testator at the execution of the document.[16] The statute relating to the taking proof of the execution and validity of lost wills is remedial, and should be liberally construed.[17] In this spirit Wood-

[11] Appendix II; 1 Redf. Wills, ed. of 1876.

[12] This is a principle too well known to require reference to any but the more leading text books and cases. Vide Story Eq. Jur. § 88; Starkie Ev. 531, n; Cresley Ev. 269; 1 Phillipps Ev. 5 and 6; 2 Best Ev. (Morgan's Notes) 814; 1 Greenleaf Ev. § 558; Smith v. Carrington, 4 Cranch, 62; Sebree v. Dorr, 9 Wheat, 558; Riggs v. Tayloe, Ib. 483; Renner v. Bk. of Columbia, Ib. 581; Tayloe v. Riggs, 1 Pet. 591; U. S. v. Rayburn, 6 Ib. 352; Winn v. Patterson, 9 Ib. 663; U. S. v. Laub, 12 Ib. 1; Williams v. U. S. 1 How. 290; DeLane v. Moore, 14 Ib. 253; Turner v. Yates, 16 Ib. 14.

[13] As to what constitutes sufficient search, see the exhaustive note to 2nd Best Ev. (Morgan's Notes), p. 814; Minor v. Tillotson, 7 Pet. 99; Simpson v. Dall. 3 Wall. 460; Williams v. U. S. 1 How. 290; DeLane v. Moore, 14 Ib. 253; Hotchkiss v. Mosier, 48 N. Y. 478; Green v. Disbrow, 7 Lans. 381; Hemphill v. McClimans, 24 Pa. St. 367; Eure v. Pittman, 3 Hawks, (N. C.) 384; Waller v. School Dis. 22 Conn. 326; Dan v. Brown, 4 Cow. 483; Jackson v. Russell, 4 Wend. 543.

[14] 1 Jarman Wills, 220; 2 Redf. Wills, 7, n; Wharton Ev. § 139; 2 Phillipps Ev. p. 532; Cow. H. & E. note, 458; Bailey v. Stiles, 1 Green Ch. 220.

[15] Dan v. Brown, 4 Cow. 483; Jackson v. Betts, 6 Ib. 377; Dickey v. Malechi, 6 Mo. 177; Kearns v. Kearns, 4 Harr. 183; Graham v. O'Fallon, 3 Mo. 507; Baker v. Dobyn, 4 Dana, 221; Boudinot v. Bradford, 2 Dall. 266; Carson's Appeal, 59 Pa. St. 493; Mullen v. McKelvy, 5 Watts, 399; Greenough v. Greenough, 11 Pa. St. 489; Vernon v. Kirk, 30 Ib. 218; McKee v. White, 50 Ib. 354.

[16] Jackson v. Christman, 4 Wend. 277; Peebles v. Case, 2 Bradf. 226; Chaffee v. Baptist, etc. 10 Paige, 85; Jauncey v. Thorne, 2 Barb. Ch. 40; Thomas v. Turner, 6 T. B. Mon. 52; Haynes v. Haynes, 33 O. S. 598.

[17] Hall v. Allen, 31 Wis. 691.

worth, J., in Dan v. Brown,[18] required that only a *prima facie* case of due execution be made out.

Proof of Contents.—Both in England and America it has been held that the contents of a lost will may be proved by the evidence of a single witness, though he be interested, whose credibility and means of knowledge are not questioned.[19] It is not necessary that the witness recall the exact words of the original,[20] but the evidence must be clear and satisfactory.[21] Authorities differ upon the question, whether or not the provisions of the original must be reproduced *in toto*. It has been said that the evidence must be of the whole contents, without exception or omission.[22] The more reasonable doctrine that probate may be made of so much of the will as can be satisfactorily established, is supported by good authority.[23] The leading English case of Sugden v. Lord St. Leonards,[24] decided in 1876, seems to settle the point beyond question, that portions of the original may be made effectual where the larger part, even, of the will cannot be restored. In general, courts demand a copy of the will upon which to grant probate, but if that be not obtainable a draft may be admitted,[25] or the will may be restored by parol evidence.[26]

Evidence.—In this class of cases it was, at one time, somewhat questioned whether secondary evidence of a will is admissible,[27] but it is now fully settled, both in England and America, that secondary evidence may be resorted to for that purpose.[28]

The declarations of the testator, both as to the continued existence, and as to the contents of the will are admissible,[29] and they are admissible both to rebut the presumption of cancellation,[30] and to support that presumption,[31] but less weight is to be given to subsequent than to contemporaneous declarations,[32] when offered as evidence of the animus with which an act is done.[33]

The Presumption of Cancellation.—It is a general rule, firmly established, both in England and America, that if a will is traced into, and not out of, the testator's possession, and cannot be found at his death, the presumption is that he destroyed it *animo revocandi*.[34] But when the will is traced out of

[18] Dan v. Brown, 4 Cow. 483.

[19] Brown v. Brown, 8 Ellis & Bl. 876; Sugden v. Lord St. Leonards, 1 L. R. P. D. 154; Dan v. Brown, 4 Cow. 483; Jackson v. Betts, 6 Id. 377; Dickey v. Malechi, 6 Mo. 177; Kearns v. Kearns, 4 Harr. 183; Baker v. Dobyn, 4 Dana, 221. The statutes of New York, Arkansas and California, require proof of contents by two witnesses, but those of the first two States make a draft or copy equivalent to one witness.

[20] Allison v. Allison, 7 Dana, 95.

[21] Davis v. Sigourney, 8 Metc. 487; Eure v. Pitman, 3 Hawks, 364; Hylton v. Hylton, 1 Gratt. 161; Rhodes v. Vinson, 9 Gill. 169; Chisholm's Heirs v. Ben, 7 B. Mon. 415; Jones v. Murphy, 8 Watts & Serg. 275; Hatch v. Sigman, 1 Dem. (N. Y.) 519; Clarke v. Morton, 5 Rawle, 235; Johnson's Will, 40 Conn. 587.

[22] Davis v. Sigourney, 8 Metc. 487; Durfee v. Durfee, Id. 490, n; Rhodes v. Vinson, 9 Gill 169; Butler v. Butler, 5 Harr. 178; Johnson's Will, 40 Conn. 587; Sheridan v. Houghton, 6 Abb. (N. Y.) N.Cas. 234; McNally v. Brown, 5 Redf. 372; Wharram v. Wharram, 3 Sw. & Tr. 301.

[23] Steele v. Price, 5 B. Mon. 72; Jackson v. Jackson, 4 Mo. 210; Dickey v. Malechi, 6 Ib. 177; Williams on Ex, 42: 3 Redf. Wills, 53.

[24] Sugden v. Lord St. Leonards, 1 L. R. P. D. 154.

[25] 2 Redf. Wills, 7, n; Jackson v. Lucett, 2 Caines, 263; Jackson v. Russell, 4 Wend. 543; Smith v. Steele, 1 Harr. & McHen. 419; Happy's Will, 4 Bibb. 553; Sly, v. Sly and Dredge, L. R. 2 P. D. 91; *In re*, Barber, L. R. 1 P. & D. 267. The same principle is, in effect, upheld in the cases cited in note 26, herein.

[26] See notes 27-32; Wharram v. Wharram, 3 Sw. & Tr. 301; Podmore v. Whatton, Ib. 449; Finch v. Finch, 1 L. R. P. & D. 371; Burls v. Burls, 1 L. R. P. & D. 472; *In re*, Barber, 1 L. R. P. & D. 267; Graham v. O'Fallon, 3 Mo. 507; Jackson v. Jackson, 4 Id. 210; Dickey v. Malechi, 6 Id. 177.

[27] Quick v. Quick, 1 Sw. & Tr. 146.

[28] See notes 26, 27, 29-33. See also note 12, for the general principle. Redf. Wills, § 348; Williams Ex. 147; Wharton Ev. § 138; Starkie Ev. 543; Taylor Ev. §§ 435, 495; Brown v. Brown, 8 E. & B. 876; *In re*, Brown, 1 Sw. & Tr. 32; *In re*, Gardner, Ib. 109; Doe v. Ross, 8 Dowl. 389; Eckersley v. Platt, 1 L. R. P. & D. 281; Jackson v. Betts, 9 Cow. 208; Voorhees v. Voorhees, 39 N. Y. 463; Harris v. Harris, 36 Barb. 88; Bulkley v. Redmond, 2 Bradf. 281.

[29] Bests Ev. 401; Whar. Ev. § 139; Taylor Ev. 168; Reynold's Stephen Ev. 70, 71; 1 Greenl. Ev. § 558, n; Whiteley v. King, 17 C. B. (N. S.) 756; Saunders v. Saunders, 6 Ec. & Mar. Cas. 518; Williams v. Jones, 7 Id. 106; Eckersley v. Platt, 1 L. R. P. & D, 281; Patton v. Poulton, 1 Sw. & Tr. 55; Brown v. Brown, 8 E. & B. 876; Sugden v. Lord St. Leonards, 1 L. R. P. D. 154; Mercer v. Mackin, 14 Bush, 434; Pickens v. Davis, 134 Mass. 252; Johnson's Will, 40 Conn. 587; Foster's Appeal, 87 Pa. St. 67; Hatch v. Sigman, 1 Dem. (N. Y.) 519; Southworth v. Adams, 11 Biss. 256; Legare v. Ashe, 1 Bay, (S. C.) 464.

[30] See cases cited in note 29.

[31] Keen v. Keen, L. R. 3 P. & D. 105.

[32] Johnson v. Lyford, L. R. 1 P. & D. 546.

[33] Pemberton v. Pemberton, 13 Ves. 310; *In re*, Weston, L. R. 1 P. & D. 633.

[34] This presumption is either expressly stated or indirectly recognized in all the cases cited in note 29, herein. But see further: Lillie v. Lillie, 3 Hagg. 184; Helyar v. Helyar, 1 Phill. Rep. Lee's Judg. 472; Wharram v. Wharram, 3 Sw. & Tr. 301; Doe v. Palmer, 16 Q. B. 747; Colvin v. Frazer, 2 Hagg. 266; *In re*, Shaw 1 Sw. & Tr. 62; Togart v. Squire, 1 Curt. 289; Welch v. Phillips, 1 Moo. P. C. 299; Finch v. Finch, L. R. 1 P. & D. 371; Battyl v. Lyles, 4 Jur. N. S. 718; Dickinson v. Stidolph, 11 Com. B. (N. S.) 341; *In re*, Brown,

the testator's possession it is incumbent upon the party alleging revocation to prove that it came again into the testator's custody, or was destroyed at his express request.[35] And further, if, after execution of the will, the testator becomes insane, the opponent of the will must prove destruction of the same by the testator during a lucid interval.[36] The presumption under consideration is but a weak one.[37] It is only a *prima facie* presumption, and not a legal conclusion.[38] Speaking of this presumption the learned judge, in Whiteley v. King,[39] says: "All these presumptions, if they come to be analyzed, may be resolved into the reasonable probability of fact deduced from the ordinary practice of mankind, and from sound reason. Persons in general keep their wills in places of safety. They are instruments in their nature revocable. Testamentary intention is ambulatory till death, and if the instrument be not found in the repositories of the testator, the common sense of the matter *prima facie* is, that he himself destroyed it, meaning to revoke it." This is a presumption which may be rebutted by either direct or circumstantial evidence.[40] Now, what is meant by *animo revocandi?* The legal signification of the phrase is no more than the English translation of the Latin words, which is: *with the intention of revoking*, and, therefore, to fathom the intention of the testator with regard to his will, is the task set before the court (in the absence of statutory guidance), upon an application being made for the admission of a copy or draft of a lost or spoliated will to probate. Such intention may be disclosed (a), by the acts of the testator; (b), by his declarations, or (c), it may be inferred from the circumstances of the case, *i. e.*, from the will itself. To illustrate: (a) In Dan v. Brown,[41] the testator, several months before his death, called for his will, and stated to his attorney that he wished to add a codicil. Woodworth, J. considers this act on the testator's part, evidence of his approval of the general features of the will, and his desire to adhere thereto, expressly stating the opinion of the court to be, that, while little weight was to be given (in this case) to the declarations of the testator, yet the simple act referred to was sufficient evidence to warrant the finding that the will remained in force at the death of the testator. (b) If the testator be a sane and honest man, having no motive to deceive, then his declarations that his will exists, his expressions of satisfaction in that fact, and in the contents of the instrument, are conclusive proof that he had not destroyed it intentionally. Wharton evidently considers the belief of the testator in the continued existence of his will, a complete rebuttal of the presumption now under consideration. He says,[42] "Even where a will which has been duly executed, has been lost, parol evidence is admissible to show that the loss did not occur from an intention of revocation on the testator's part, *but* that he believed that it was still in existence at the time of his death." In Whiteley v. King,[43] the court through Earl, C. J., says:

"Surely you may look at a man's words to see what his intentions are. The question here was, whether the testator had the intention to destroy his will and codicil. * * * * The declarations of the testator are cogent evidence of his intention. In this case his repeated declarations, down to within a very few days of his death, were abundant evidence that the testator did not intend to cancel or destroy his will. (c) In Sugden v.

1 Sw. & Tr. 32; Wood v. Wood, 1 L. R. P. & D. 309; Cutto v. Gilbert, 9 Moo. P. C. 143; Smock v. Smock, 11 N. J. Eq. 156; Brown v. Brown, 10 Yerg. 84; Betts v. Jackson, 6 Wend. 173; Dudley v. Wardner, 41 Vt. 59; Idley v. Bowen, 11 Wend. 227; Dawson v. Smith, 3 Houst. 335; Davis v. Sigourney, 8 Metc. 487; Minkler v. Minkler, 14 Vt. 125; Appling v. Eades, 1 Gratt. 286; Holland v. Ferris, 2 Bradf. 334; Weeks v. McBeth, 14 Ala. 474; Johnson v. Brailsford 2 Nott. & McC. 272; Jones v. Murphy, 8 Watts & Serg. 275; Beaumont v. Keim, 50 Mo. 28; Patterson v. Hickey, 32 Ga. 156; Bounds v. Gray, Ga. Dec. Pt. II, 136; Liveley v. Harwell, 29 Ga. 509; Havens v. Van Den Burgh, 1 Dem. 27; Kitchens v. Kitchens, 39 Ga. 168; Jackson v. Kniffen, 2 Johns. 31; Lewis v. Lewis, 2 Watts & Serg. 455; Burns v. Burns, 4 Serg. & Rawle, 295; Hildreth v. Shillinger, 10 N. J. Eq. 196; Bailey v. Stiles, 1 Green Ch. 220.

[35] Colvin v. Frazer, 2 Hagg. 327; Wynn v. Heveningham, 1 Coll. 638; Schultz v. Schultz, 35 N. Y. 653; Hildreth v. Shillinger, 10 N. J. Eq. (2 Stark.) 196.

[36] Harris v. Berral, 1 Sw. & Tr. 153; Sprigge v. Sprigge, 1 L. R. P. & D. 608; Whiteley v. King, 17 C. B. (N. S.) 756; Saunders v. Saunders, 6 Ec. & Mar. Cas. 518; Williams v. Jones, 7 Id. 106; Patton v. Poulton, 1 Sw. & Tr. 55; Ekersley v. Platt, 1 L. R. P. & D. 148.

[37] Brown v. Brown, 8 E. & B. 875, 889, n.

[38] Legare v. Ashe, 1 Bay. S. C. 464.

[39] Whiteley v. King, 17 Com. B. (N. S.) 756.

[40] See notes 26–31, herein.

[41] Dan v. Brown, 4 Cow. 483.

[42] Wharton Ev. § 138.

[43] Whiteley v. King, 17 Com. B. N. S. 756.

Lord St. Leonards[44] Sir J. Hannen remarks: "This presumption may be rebutted by evidence leading to the conclusion, that the testator did not do that which, in the absence of evidence to the contrary, it is presumed he had done. That evidence must necessarily be of great variety, according to the various circumstances of the cases that are presented to courts of justice. The first element of this consideration of whether or not a testator has destroyed his will, is to be found in the instrument itself." Later in the same case, in reviewing the decision of Sir J. Hannen, Cockburn, C. J. says:[45] "You must take into account the improbability of a man like Lord St. Leonard's destroying his will and doing so with the intention of dying intestate * * * * In substance, we have Lord St. Leonards, down to the very last moments of his life, saying "I have made all the testamentary dispositions which a careful man ought to make, which a father ought to make for his family, and I die in peace with that conviction.'" In general it may be said, that where a man makes his will with a definite object in view, *e.g.*, to make special provision for a certain favorite,[46] and the circumstances surrounding the testator at the making of the will remain the same at his death, it is unnatural to suppose that he would deliberately defeat, by destroying that will, the very purpose which originally controlled him.

United States Statutes.—The statutes of the various States bearing upon the restoration of lost and spoliated wills, may be classed under two divisions. 1. Those which provide for the admission to probate of a copy of the original, when it is proven, either that the will existed subsequent to the death of the testator, or was destroyed, without his consent, during his lifetime.[47] 2. Those which do not allow probate of a copy in the second case, but demand that the will be proven to have existed subsequent to the death of the testator.[48] For convenience, let the New York and Ohio statutes be treated as representatives of their respective divisions. The only fair interpretation of the New York statute, is to consider the intention of the law makers to have been, to incorporate the common law presumption of destruction of a lost will *animo revocandi*, into the statutory law of that State. If the will existed subsequent to the testator's death, or was fraudulently destroyed during his lifetime, then he did not destroy it *animo revocandi*. To satisfy the requirements of the statute is to rebut the presumption, and *vice versa*. Such is, in effect, the treatment of the statute in Schultz v. Schultz.[49] And I find no authority denying to the petitioner the right to satisfy the statute by any of the methods, which have been mentioned, for rebutting the presumption.

Of the Ohio Statute it is difficult to see the justice. In the light of the decision in Mary Sinclair's will,[50] it would seem that the legislature lost sight of the well known legal principal, denying to any man the right to take advantage of his own wrong. As equity has no jurisdiction to give relief,[51] the heir at law might, in a contest of a lost will, come into court boasting of his destruction of the original, no matter what might be the injury to the testator as well as to the devisee, relying upon the statute to protect him in the enjoyment of the estate thus fraudulently obtained. This statute requires that the court be satisfied that the original will existed subsequent to the death of the testator. It cannot be argued that it is incumbent upon the applicant for the establishment of the lost will to prove the continued existence by positive evidence. Such evidence is not obtainable under the circumstances of the case. The court is to be satisfied of that fact, or, as U. S. Circuit Judge Dyer puts it,[52] is to be "judicially convinced." This continued existence may be proven as well by circumstantial, as by direct evidence.[53] Under this statute, therefore, as well as in New York, in the absence of direct evidence on either side,[54] the question is whether or not the reasonable probability is, that the will was lost or destroyed after the testator's death. If the court is satisfied that it was so lost or destroyed, probate must be granted

[44] Sugden v. Lord St. Leonards, 1 L. R. P. D. 154, 195.
[45] Ib. p. 214.
[46] Legare v. Ashe. 1 Bay. 464.
[47] Statutes of Arkansas, California, Georgia, Indiana, New York and Wisconsin.
[48] Statutes of Colorado, Kansas and Ohio. The statutes of the other States are silent on this particular topic.
[49] Schultz v. Schultz. 35 N. Y. 653.
[50] Mary Sinclair's Will, 5 O. S. 290.
[51] See note 3.
[52] In Southworth v. Adams, 11 Biss. 256.
[53] Schultz v. Schultz, *supra;* See notes 26–32, herein.
[54] See note 55, herein.

on the copy or draft of the original. In spite of the harshness of the statute above referred to, there are three points in the decisions of Ohio, which seem to indicate a decided leaning in favor of the will. 1. The statutes allow the court, in the hearing of the original application, to examine only those witnesses who are in favor of the probate of the copy, and thus preclude to the opponent, the possibility of proving the destruction of the will prior to the testator's death;[55] and after the copy is once admitted to probate, the *onus probandi* is shifted to the contestants.[56] 2. The statute is, to some extent, *in odium spoliatoris*, and in order to render the remedies at all practical and effective, it is proper that it should be administered somewhat in the same spirit.[57] To reconcile the dicta of the same court in Sinclair's will and Banning v. Banning is a task beyond the powers of discernment and analysis of the average mind. 3. The leaning of the law in Ohio, unlike that in England is in favor of the devisee instead of the heir.[58]

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[55] Rev. Stats. § 5946; Hathaway's Will, 4 O. S. 383.
[56] Haynes v. Haynes, 33 O. S. 598.
[57] Banning v. Banning, 12 O. S. 437.
[58] Ib. Smith v. Jones, 4 O. 116.

INJURIES TO CHILDREN.

In actions for this class of injuries it is necessary to consider several essential particulars: 1. The age and capacity of the injured child. 2. Whether the court having jurisdiction of the action will apply what is technically known as the rule of "imputed negligence." 3. Whether the action is by the injured child or by its parents for loss of service, expense of medical treatment or for a statutory penalty in case of death. 4. The circumstances of injury.

Age and capacity of the child. When it is clearly established that a child's infirmities of age or intellect are such that it has no capacity for distinguishing between circumstances of danger and safety, or avoiding the one in preference to the other, the court will, as a matter of law, pronounce it *non sui juris*, and, therefore, personally incapable of contributory negligence. When it's capacity does not clearly appear, it is a proper question for the jury whether the child is *sui juris*. On the other hand, when it is evident that the child is capable of caring efficiently for its safety, the court will, as a matter of law, pronounce it *sui juris*.

Thus it has been held as a matter of law that children of the following ages are to be regarded as *non sui juris:* One year and five months,[1] two years,[2] two years and four months,[3] two years and nine months,[4] three years and seven months,[5] nearly four years,[6] four years,[7] under five years,[8] five years,[9] six years,[10] and it would seem even seven years.[11] But this question was decided by the jury in cases of children of the following ages: Ten years,[12] eight years,[13] nearly seven years,[14] six years and seven months,[15] six years,[16] five and one half years,[17] five years,[18] and even four years and seven months.[19] However, a boy nearly eleven years old, active and intelligent, has been pronounced by the court capable of taking care of himself upon the street.[20]

When the age of the child is such that it is close upon the dividing line between that

[1] Kreig v. Wells, 1 E. D. Smith, 74.
[2] Hartfield v. Roper, 21 Wend. 615; Wright v. Malden, etc. R. Co., 4 Allen, 283.
[3] Callahan v. Bean, 9 Allen, 401.
[4] Evansville, etc. R. Co. v. Wolf, 59 Ind. 89; O'Flaherty v. Union R. Co., 45 Mo. 70.
[5] Mangam v. Brooklyn, etc. R. Co., 38 N. Y. 455; s. c., 36 Barb. 230.
[6] McLain v. Van Zandt, 7 Jones & Sp. 347; s. c., 48 How. Pr. 80.
[7] Lehman v. Brooklyn, etc. R. Co., 29 Barb. 234; North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187.
[8] Lafayette, etc. R. Co. v. Huffman, 28 Ind. 287.
[9] Jeffersonville, etc. R. Co. v. Bowen, 40 Ind. 545; s. c., 49 Ind. 154; McGarry v. Loomis, 63 N. Y. 104; Pittsburgh, etc. R. Co. v. Cadwell, 74 Pa. St. 421.
[10] Chicago v. Starr, Adm., 42 Ill. 174.
[11] Pittsburgh, etc. R. Co. v. Vining's Adm., 27 Ind. 513.
[12] Lovett v. Salem, etc. R. Co., 9 Allen, 557; Karr v. Parks, 40 Cal. 188.
[13] Drew v. Sixth Ave. R. Co., 26 N. Y. 49; s. c., 3 Keyes, 429.
[14] Oldfield v. Harlem, etc. R. Co., 14 N. Y. 310; s. c., 3 E. D. Smith, 103.
[15] Honegsberger v. Second Ave. R. Co., 1 Keyes, 570; s. c., 33 How. Pr. 195; 1 Daly, 89.
[16] Cosgrove v. Ogden, 49 N. Y. 255.
[17] Barksdaill v. New Orleans, etc. R. Co., 23 La. An. 180.
[18] Karr v. Parks, 40 Cal. 188; s. c., 44 Cal. 46.
[19] Lynch v. Smith, 104 Mass. 53; St. Paul v. Kuby, 8 Minn. 154.
[20] O'Mara v. Hudson, etc. R. Co., 38 N. Y. 445; McMahon v. New York, 33 N. Y. 642, 647. See also Nagle v. Allegheny, etc. R. Co., 8 Cent. L. J. 307.

class of children whom the court will pronounce *non sui juris* and that which is relegated to the decision of the jury, it is not surprising to find testimony that the child is one of more than ordinary intelligence and activity[21] or possessed of discretion in advance of its years and size,[22] for it being established that the child is capable of appreciating danger and avoiding it, the parent will not be subject to the charge of negligence in allowing it to go at large with a certain degree of freedom.

The rule which imputes the negligence of the parents of children, or the custodians of other persons now *sui juris*, to their respective charges found expression in this country for the first time in the case of Hartfield v. Roper,[23] and twenty years before, it received the sanction of the English courts. It was resolved in Hartfield v. Roper that where a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by its parents to be in a public highway without any one to guard it, and is there run over by a traveller and injured, neither trespass nor case will lie, unless the injury be "voluntary" or the result of "gross neglect" on the part of such traveller. In an action for such injury, if the conduct of the child be such as would constitute negligence on the part of an adult, although the child, by reason of its tender age, be incapable of using that degree of care which is expected of a person of prudence, the want of such care on the part of parents or guardians of the child furnishes a complete defence to an action by the child for the injury sustained.[23]

A single extract from the opinion of the court will be sufficient to present the grounds of the decision. Said Cowen, J.[24] An infant is not *sui juris*. He belongs to another to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant; his neglect, the infant neglect.

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[21] Oldfield v. Harlem, etc. R. Co., 14 N. Y. 310.
[22] Lynch v. Smith, 104 Mass. 53.
[23] 21 Wend., 615.
[24] 21 Wend., 619.

TELEPHONE LAW — PATENT RIGHT — CONSTITUTIONAL LAW — POWER OF STATE TO REGULATE PROPERTY CREATED UNDER A PATENT — PROPERTY DEVOTED TO PUBLIC USE.

HOCKETT v. STATE.

Supreme Court of Indiana, Novembr, 1885.

TELEPHONE — *State Regulation — Act Limiting Rental Price of Instruments—Constitutional Law.*—The State has the right to prescribe the maximum price which a telephone company shall charge for the use of its telephones, and the act of April 13, 1885, limiting the rental price of such instruments, and also the amount which shall be collected for conversations between cities and villages, is constitutional.

———. *Patent—Power of State to Regulate Property Created Under*—The fact that the telephone and appliances are articles patented under the Constitution and laws of the United States, while vesting in the patentee, his heirs and assigns, the exclusive right for a limited time, to make, use and vend the tangible property brought into existence by the application of the discovery covered by the letters patent, does not preclude State regulation of the property thus brought into existence.

———. *Property Devoted to Public Use*—In legal contemplation all the instruments and appliances used by a telephone company in the prosecution of its business are devoted to a public use, and property thus devoted to such use becomes a legitimate subject of legislative regulation.

———, *Guaranteed Rights in Property.*—State regulation of property devoted to a public use is not the taking of property for a public purpose within the meaning of § 21, of art. 1, of the Constitution of this State, nor is it an interference with the guaranteed rights of the citizen in private property.

———. *Word "Telephone" Includes all Instruments for Reception and Transmission of Messages.*—The word "telephone," as used in the act of April 13, 1885, was intended to designate, and did in fact refer to an apparatus composed of all the usual and necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument only.

———. *Term of Art.—Evidence*—The word "telephone" having become a term of art, evidence is admissible to explain its proper meaning.

———. *Legislative Intention.*—There being nothing in the act of April 13, 1885, or in other laws, which requires a telephone company to construct a new line against its will, or to maintain an old line longer than it may feel justified in doing, evidence that it could not construct, or continue to use a particular line at the price limited without loss, cannot be considered in determining the legislative intention in passing such act.

———. *Justice or Expediency of Act—Remedy.*—Where a statute is one which the legislature had power to enact, the courts can not sit in judgment upon either its justice or expediency, but relief must be sought of the legislature.

From the Marion Criminal Court.

J. E. McDonald, J. M. Butler. A. L. Mason, T.

A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, — Williams, and *— Thompson*, for appellant; *F. T. Hord*, Attorney-General, *A. C. Harris, W. H. Calkins, C. Byfield and L. Howland*, for the State.

NIBLACK, C. J. delivered the opinion of the court:

On the 13th day of April, 1885, the legislature of this State passed an act entitled "An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation," the tenor of which is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That no individual, company or corporation, now or hereafter owning, controlling or operating any telephone line in operation in this State shall be allowed to charge, collect or receive as rental for the use of such telephones, a sum exceeding three dollars per month where one telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month.

"SEC. 2. Where any two cities or villages are connected by wire operated or owned by any individual, company or corporation, the price for the use of any telephone for the purpose of conversation between such cities or villages, shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected or received.

"SEC. 3. Any owner, operator, agent or other person, who shall charge, collect or receive for the use of any telephone any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offence, and on conviction shall be fined in any sum not exceeding twenty-five dollars."

On the 27th day of July, 1885, Theodore P. Haughey, requested the Central Union Telephone Company, a corporation organized under the laws of the State of Illinois, but owning and operating a telephone exchange, and system of telephone lines, at the city of Indianapolis, in this State, to rent him one telephone, to be used at his residence upon his farm, four and one-half miles from the company's telephone exchange, and two miles outside of the corporate limits of the city of Indianapolis, and to connect such telephone with the exchange by the erection of the necessary poles and wires. In response to this request, the company offered to rent to Haughey a hand telephone and magneto bell, and to connect them with its exchange, and to furnish exchange service from 7 o'clock, a. m., until 6 o'clock, p. m., each day, for $3 per month, the company to have the right to place other subscribers upon the same line. But Haughey declined to accept that offer, and instead entered into a contract with the company for the use of "one battery transmitter and one magneto telephone," and "the necessary appliances for connecting them with the exchange," upon certain terms and conditions named in the contract, for which he agreed to pay the company the sum of $33.50 for each quarter, or $11.16 2-3, per month. The contract says:

"The above total sum is based upon the charges itemized as follows:

"Rental of one magneto telephone and one battery transmitter, (two telephones), at the rate of, $20 per ann'm

"Labor and service charges for switching, construction and maintenance charges for lines, batteries, central office apparatus, magneto bell and other appurtenances, at the rate of, ...$114 " " "

The telephone company built the line and furnished the equipments for the use of Haughey, called for by its contract with him.

At the expiration of the first three months after the contract went into effect, the appellant, John E. Hockett, acting as the district superintendent and general agent of the company at Indianapolis demanded of, and received from Haughey the sum of $33.50, claimed to be due under the contract for the latter's use of the line and equipments therein provided for, during the preceding three months.

An information was thereupon filed against Hockett, charging him with a violation of the provisions of the act of the legislature, herein above set out, and, upon proof of the matters above stated, with others of a formal, incidental, or a merely collateral character, the court below found him guilty of having charged more for the use of a telephone than the law permitted him, as well as the company he represented, to do, and, after overruling a motion for a new trial, adjudged that he pay a fine as a penalty for the commission of a criminal offence.

It was shown at the trial that articles furnished to Haughey as a telephone equipment, as well as all the other mechanical contrivances used by the company in the transmission of words and sounds over its wires, are patented articles, and that the company holds the right to use these patented articles by assignment either direct or remote from the patentee.

It is first and most earnestly contended that, as the articles used by the company as above are patented, under the Constitution and laws of the United States, the legislature of a State has no power to limit the price, use, sale or rental value of such articles, and that, as a consequence, all acts of a State Legislature of the class to which the one before us belongs, are inoperative and ineffectual for any practical purpose. Conceding the force, as well as the plausibility, of many of the arguments and illustrations used by counsel, the ready, and, indeed, inevitable answer is, that the question thus presented ought no longer to be regarded as an open question. There is a reserved, and, at the same time, well recognized

power, affecting their domestic concerns, remaining in all the States, which the government of the United States can not, and has seldom attempted to invade. This power is so varied and comprehensive that an exact definition, as applicable to all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized, in particular cases, are quite numerous, as well as various in their application to our complex system of government. This reserved power is usually, though perhaps not always accurately, denominated the police power of a State, and embraces the entire system of internal State regulation, having in view not only the preservation of public order and the prevention of offences against the State, but also the promotion of such intercourse between the inhabitants of the State as is calculated to prevent a conflict of rights and to promote the interest of all. Cooley Const. Lim. 572.

It is a power inherent in every sovereignty, and is, in its broadest sense, nothing more than the power of a State to govern men and things within the limits of its own dominion. License Cases, 5 How. 504, 582.

It extends to the protection of the lives, limbs, health, comfort and convenience, as well as the property of all persons within the State. It authorizes the legislature to prescribe the mode and manner in which every one may so use his own, as not to injure others, and to do whatever is necessary to promote the public welfare, not inconsistent with its own organic law. Thorpe v. R. & B. R. R. Co., 27 Vt. 140.

In 1867 letters patent were issued to one DeWitt for a discovery in the manufacture of a quality of oil known as "Aurora Oil," and one Patterson, became the assignee of the right conferred upon DeWitt by his letters patent. Under a system of inspection provided by the laws of Kentucky, some casks containing this Aurora oil were branded "unsafe for illuminating purposes," and notwithstanding a statute of that State making it a penal offence to sell oil thus branded, Patterson sold the casks of oil in question to one Davis. Patterson was thereupon indicted, tried and convicted in one of the Kentucky courts for the alleged unlawful sale of these condemned casks of oil. This judgment convicting Patterson of a criminal offence having been affirmed by the Court of Appeals of that State, the cause was taken to the Supreme Court of the United States to test the validity of the statute under which Patterson was so convicted, as a restraint upon the sale of a commodity covered by letters patent from the United States. Upon a review of all the questions involved, the validity of the statute was maintained and the judgment of the Court of Appeals was in all things affirmed. See Patterson v. Kentucky, 97 U. S. 501.

The court held in that case, and as we have no doubt correctly, that all that the letters patent secured was the exclusive right in the discovery, and that the right thus secured was an incorporeal right, and hence without "tangible substance;" that the right to sell the oil was not derived from the letters patent, but existed and could have been exercised before the issuing of such letters, unless prohibited by some local statute; that because the patentee acquired a monopoly in his discovery, and was hence secure against interference, it did not follow that the tangible property which came into existence by the application of the discovery was beyond the control of State legislation; that, on the contrary, the right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright itself; that hence the right conferred upon the patentee and his assigns to make, use and vend the corporeal article or commodity brought into existence by the application of the patented discovery must be exercised in subordination to the police or local regulations established by the State. The doctrine of that case was approved and followed in the more recent case of Webber v. Virginia, 103 U. S. 344, and has the support, either in direct terms or in principle, of numerous other carefully considered cases. Patterson v. Commonwealth, 11 Bush, 311 (21 Am. R. 220); State v. Telephone Co., 36 Ohio St. 296 (38 Am. R. 583, and note); Jordan v. Dayton, 4 Ohio, 295; Fry v. State, 63 Ind. 552; People v. Russell, 49 Mich. 618 (43 Am. R. 478); Thompson v. Staats, 15 Wend. 395; Martinetti v. Maguire, Deady, 216; Vannini v. Paine, 1 Harrington, 65; License Tax Cases, 5 Wall. 462; United States v. DeWitt, 9 Wall. 41; Railroad Co. v. Husen, 95 U. S. 465; Beer Co. v. Massachusetts, 97 U. S. 25; Brechbill v. Randall, 102 Ind. 528 (52 Am. R. 695); Palmer v. State, 39 Ohio St. 236 (48 Am. R. 429); Western U. Tel. Co. v. Pendleton, 95 Ind. 12 (48 Am. R. 692); New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.

While, therefore, it is true that letters patent confer upon the patentee a monopoly to the extent of vesting in him, his heirs and assigns, the exclusive right to make, use and vend the tangible property brought into existence by a practical application of the discovery covered by the letters patent, for a limited time, it is not true that such exclusive right authorizes the making, using or vending of such tangible property in a manner which would be unlawful except for such letters patent, and independently of State legislation and State control.

It is next contended that the Central Union Telephone Company was organized, and has so far been conducted as an ordinary business investment, and is in its methods, as well as in its relations to its patrons and subscribers, a merely private enterprise, no more subject to legislative control than any other private business with which a considerable number of persons have become either directly or indirectly connected; that conse-

quently the act of the legislature, under which this prosecution was instituted, is inoperative and void as a restraint upon the company in its charges for the rental and use of its instruments.

The telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage coach and sailing vessel a hundred years ago, or as the steamboat, the railroad and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may, therefore, be regarded, when relatively considered, as an indispensable instrument of commerce. The relations which it has assumed towards the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose upon it certain well defined obligations of a public character. All the instruments and appliances used by a telephone company in the prosecution of its business are consequently, in legal contemplation, devoted to a public use. State, *ex rel.* v. Nebraska Telephone Co., 22 N. W. Rep. 237; 22 Cent. Law Jour. 33; State of Missouri v. Bell Telephone Co., 23 Fed. Rep. 539; State v. Telephone Co., *supra*; American Rapid Tel. Co. v. Connecticut Telephone Co., 44 Am. R. 237, n.

It is now a well settled legal proposition that property thus devoted to a public use becomes a legitimate subject of legislative regulation and control. In recognition of that doctrine the case of Munn v. Illinois, 94 U. S. 113, has become a leading case.

It was, in general terms, held in that case, that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use to which he has so devoted his property, and that he can only escape such public control by withdrawing his grant and discontinuing the use. In support of that conclusion, the court said it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like, and, in so doing, to fix a maximum of charges to be made for services rendered, accommodations extended and articles sold. This case has been the subject of much unfriendly comment and has encountered some very sharp criticism, but its authority as a precedent remains unshaken.

This State regulation and control of property devoted to a public use is not the taking of property for a public purpose within the meaning of § 21 of art. 1 of the Constitution of this State. Nor is such regulation and control an interference with the guaranteed rights of the citizen in private property. As bearing generally upon the subjects lastly above referred to, see, also, the cases of Chicago, etc., R. R. Co. v. Iowa, 94 U. S. 155; Chicago, etc., R. R. Co. v. Ackley, 94 U. S. 179; Winona, etc. R. R. Co. v. Blake, 94 U. S. 180; Railroad Co. v. Richmond, 96 U. S. 521; Railroad Co. v. Fuller, 17 Wall. 560; Olcott v. Supervisors, 16 Wall. 678; Ruggles v. Illinois, 108 U. S. 526; Spring Valley Water Works v. Schottler, 110 U. S. 347; Ruggles v. People, 91 Ill. 256; Illinois Central R. R. Co. v. People, 108 U. S. 541; s. c., 1 A. & E. R. R. Cas. 188; Allnut v. Inglis, 12 East, 527; Mayor, etc. of Mobile v. Yuille, 3 Ala. 137; N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. 343; Bolt v. Stennett, 8 T. R. 606; Com. v. Duane, 98 Mass. 1; Com. v. Tewsbury, 11 Met. 55; Com. v. Alger, 7 Cush. 53; Metropolitan Board v. Barrie, 34 N. Y. 657; Slaughter-House Cases, 16 Wall. 36; Sharpless v. Mayor, etc., 21 Pa. St. 147; Grant v. Courter, 34 Barb. 232; Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Mass., *supra;* Ogden v. Saunders, 12 Wheat. 212;Standard Oil Co. v. Combs, 96 Ind. 179 (49 Am. R. 156); Western U. Tel. Co. v. Pendleton, *supra;* Indianapolis, etc. R. R. Co. v. Kercheval, 16 Ind. 84; Foster v. Kansas, 112 U. S. 201; Brechbill v. Randall, 102 Ind. 528; Fry v. State, *supra;* Toledo Agr'l Works v. Work, 70 Ind. 253; West Virginia, etc. Co. v. Volcanic Oil Co., 5 W. Va. 382; State v. Perry, 5 Jones L. 252; Attorney General v. Railroad Companies, 35 Wis. 425.

The obvious deduction from what has been said, as well as from the authorities cited, is, that the power of a State legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete.

It was made to appear by the evidence that there are several instruments more or less in use by telephone companies, each known as a "telephone," one as the hand telephone, another as the box telephone, a third as the switchman's head telephone, and the fourth as the battery transmitting telephone; that the first, known also as the Bell hand or magneto telephone, consists of a bar magnet with a helix of wire at one end, a diaphragm suitably mounted in front of the helix, and a hard rubber case supporting the whole, with combined poles for making connection with a cord from twenty-four to thirty inches long, and through it with a magneto bell; that this telephone will both transmit and receive sounds or words carried electrically over a connecting wire; that this instrument was at first, with the assistance only of the magneto or call bell, used in transmitting as well as in receiving telephonic messages; that some time after this Bell hand telephone had thus come into use, the battery transmitting telephone, known as the Blake transmitter, was introduced and generally accepted as a very

decided improvement in the transmission of words and sounds over wires used by telephone companies, words and sounds being transmitted through it in a louder tone and with greater effect than through the Bell hand telephone; that for some time previous to the 13th day of April, 1885, this Blake transmitter had come into general use in the transmission of messages with that class of patrons and subscribers who desired the best available telephonic service; that since the Blake transmitter had come into general use as stated, the Bell hand telephone had been chiefly used as a receiver for messages, only a comparatively few persons continuing to use it also for transmitting purposes; that, on the day last named, and for a considerable time previously, a fully equipped organization for the convenient and ready transmission and reception of messages over telephonic wires, consisted, as it still consists, of a Bell hand telephone and cord, a Blake transmitter, a magneto or call bell, a cell of battery, a backboard and a battery box; that the instruments thus constituting a telephonic equipment have been and still are only rented by telephone companies to their patrons and subscribers, the latter not being allowed to either purchase or own any of such instruments.

Upon the facts thus disclosed by the evidence, it is, in the third place, contended that the act of April 13, 1885, under consideration, only limits the price to be charged to three dollars per month when one instrument, known as a telephone, is rented to a patron or subscriber, and does not apply to a case like the one before us, where two instruments, each answering to that name, are, for his greater convenience, rented to the same person to be used together, and that consequently, the facts of this case do not bring it within the penal provisions of that act.

In a general sense, the name "telephone" applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tube used in conveying the sound of the voice from one room to another in large buildings, or a stretched cord or wire attached to vibrating membranes or discs, by which the voice is carried to a distant point, is, strictly speaking, a telephone. Bnt since the recent discoveries in telephony, the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraphic wires. In a secondary sense, however, being the sense in which it is most commonly understood, the word "telephone" constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus, as an entirety, ordinarily used in the transmission, as well as in the reception, of telephonic messages. In this latter sense, the Central Union Telephone Company, in behalf of which the appellant stands as the representative in this proceeding, has very significantly sanctioned the use of the word "telephone."

In August, 1885, it published a book for the use of its patrons and subscribers, entitled "Indianapolis Telephone Directory," in which those having the use of its telephonic instruments were instructed as follows:

"Call by numbers.

"When through talking ring out.

"Make all complaints to the chief operator—call No. 1,000.

"Help each other by answering your telephone promptly.

"Do not allow non-subscribers to use your telephone. It is unjust to other subscribers, impedes the service, and is a violation of your contract.'

These were a substantial repetition of instructions issued by the Western Telephone Company, one of the predecessors of the Central Union Telephone Company, in June, 1883. It these instructions the "telephone" is plainly referred to as an organized apparatus—an institution—and not as a single instrument. In this use of the word "telephone," the telephone companies in question simply adopted and emphasized what had already been generally accepted as the proper meaning of that word in the connection in which it was so used by them.

Before the great discovery of Prof. Morse, in telegraphy, the power of electricity to give a sudden and mysterious impulse to a suspended wire was well understood among those most familiar with experiments in electrical science. His discovery consisted in the invention of an instrument, or machine, which utilized the power of electricity, and thereby enabled him to send intelligible messages over suspended wires to remotely distant places. When that instrument, or machine, first came into use, the word "telegraph" was understood to more particularly refer to it as the thing best known by that name; but since that time a much wider and more comprehensive meaning has been attached to that word.

The "telegraph" is now usually accepted, and in common parlance is generally understood, as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of: First. A battery or other source of electric power; Secondly· Of a line-wire or conductor for conveying the electric current from one station to another; Thirdly. Of the apparatus for transmitting, interrupting, and, if necessary, reversing the electric current at pleasure; and Fourthly. Of the indicator or signalizing instrument. See Imperial Dictionery, title "Telegraph."

In the respect indicated, the varying meanings of the word "telephone" are analogous to those applied to the word "telegraph," there being very much in common between the two systems of telephony and telegraphy. In reaching a conclusion as to what is generally understood by the use of the word "telephone," we have been governed partly by the information judicially within our reach, and other respects by the evidence. The word having become a term of art, evidence was

admissible to explain its proper meaning. 1 Greenl. Ev., § 280; Whart. Ev., § 961 to 972.

In view of the condition of things as shown to have existed on the 13th day of April, 1885, we feel constrained to hold that the word "telephone," as used in the act of that date, was intended to designate, and in fact really referred to an apparatus composed of all the usual and necessary instruments for the convenient and ready transmission and reception of telephonic messages, and not to a single instrument only.

There was evidence at the trial tending to prove that the Central Union Telephone Company can not supply the facilities to Haughey, provided for in its contract with him for three dollars per month, without actual and very serious loss, and, arguing that the Legislature can not be presumed to have intended to inflict injustice upon any person or corporation, it is insisted we ought to take the company's liability to sustain a great loss in a certain contingency into consideration in determining the legislative intention in enacting the statute in question in this case. This argument is largely based upon the assumption that the company was not at liberty to decline to extend its line to Haughey's farm upon his request that such an extension should be made, and that it will be compelled to maintain such extension so long, as Haughey may require it to be maintained, independently of any contract with him on the subject. This assumption is, however, not well founded. There is nothing in the act of the legislature under review, or contained in any other statutory or common law regulation applicable to the subject, to which our attention has been called, which requires a telephone company to construct a new line against its will or to maintain an old line longer than it may feel inclined to do so in the exercise of a legitimate business discretion. Besides, the power of the legislature to pass the act in question being conceded, this court can not sit in judgment upon either the justice or the expediency of the enactment of such a law. If the law shall prove to be either unjust or inexpedient in its operation, whether upon persons or corporations, the appeal must be to the legislature and not to the courts. 20 Cent. Law Jour. 83.

The judgment is affirmed, with costs.

NOTE.—This case is one of more than unusual importance. But, closely read, it is only the application of well-settled principles and rules to a new state of facts; and evidently the court does not find itself embarrassed by the novelty of the case; at least not so much as the court which first tried a railroad case found itself treading on unknown territory.

1. And first let us examine those cases where a patent right has been set up to overthrow the police regulations of a State.

The court has given a very clear and succinct statement of the case of Patterson v. Kentucky,[1] and farther comment thereon is unnecessary. That case is found reported, or decided, in the Court of Appeals of Kentucky,[2] and the reasoning is the same as in the opinion of the United States Supreme Court.

The latter court cites a *dictum* of Chancellor Kent, in Livingston v. Van Ingen,[3] where he said that "the national power will be fully satisfied if the property created by patent be, for the time given, enjoyed and used exclusively, so far as, under the laws of the several states, the property shall be deemed [fit] for toleration [and use]. There is no need of giving this power any broader construction in order to attain the end for which it was granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts."

Another case relied upon by the Supreme Court was Jordan v. Overseers of Dayton.[4] Jordan was sued in debt, to recover certain penalties for practicing medicines in violation of an Ohio statute regulating the practice of physic and surgery. His defense rested, in part, upon the ground that the medicine administered by him was that for which letters-patent had issued to his assignor, granting to the latter the exclusive right of making, constructing, using and vending to others to be used, the medicines in question, which was described in the letters patent as a new and useful improvement, and as being a mode of preparing, mixing, compounding, administering and using that medicine. The contention of Jordan was, that the State government could not restrict or control the beneficial or lucrative use of the invention; and that, as assignee of the patentee, he was entitled to administer the patented medicine without obtaining a license to practice physic or surgery as required by the statute. This contention, however, was held to be unsound, and Jordan was held rightly convicted.

Another case relied upon by the Supreme Court was Vannini v. Paine.[5] In that case it appears that Yates and McIntyre were assignees of Vananni, the inventor and patentee of a mode of drawing lotteries, and making schemes for lotteries on the combination and permutation principle. Other brokers issued a scheme for drawing a lottery, under an act for the benefit of a school, adopting the plan of Vannini's patent. Yates and McIntyre filed their bill for an injunction upon the ground, partly, that the defendants were proceeding in violation of the patent rights secured to Vannini. The court replied to this claim that: "At the times Yates and McIntyre made contracts for the lottery privileges set forth in the bill, we had in force, an act of assembly prohibiting lotteries, the preamble of which declares that they are pernicious and destructive to frugality and industry, and introductive of idleness and immorality, and against common general welfare. It, therefore, cannot be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State, merely because they have a patent for it under the United States. A person might with as much propriety claim a right to commit murder with an instrument, because he held a patent for it as a new and useful invention."[6]

A resident of Virginia sold sewing machines manufactured in New Jersey without having taken out a license in accordance with the provisions of a statute. He claimed exemption by reason of the patent on the machine, but was convicted. The Court of Appeals of that State affirmed the judgment of conviction. On appeal to the United States Supreme Court, this claim was also denied. The court said: "Congress never intended that the patent laws should displace the police

1 97 U. S. 501; S. C., 19 Alb. L. T. 156.

2 11 Bush. 311; S. C. 21 Am. Rep., 220.

3 9 Johns., 507.

4 4 Ohio, 295.

5 1 Harr. (Del.) 65.

6 Webber v. Virginia. 13 Otto, 344, S. C. 12 Cent. L. J. 488 cited and approved; Patterson v. Kentucky.

powers of the States, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits."

This case was reversed upon the point that the statute was unconstitutional, because it required a license of those who only sold articles manufactured in other States. It was an attempt to regulate commerce between the States. This latter point had been decided previously in the same court where the right to sell a patented article was involved.[7]

In Ohio it has been decided that it is no defense for selling impure provisions without a stamp required by statute, that the article sold is patented.[8] So in the same State a statute, like the one in question in the principal case, was held valid, and the fact that the telephone was patented did not affect its validity.[9]

In Michigan one peddling an article of which he is also the patentee may be required to take out a peddler's license under a municipal ordinance.[10]

In Indiana a statute required that any person taking an obligation in writing for which a patent right formed the consideration should, before it was signed by the maker, insert in the body of the obligation above the signature the words "given for a patent right." This statute was held to be unconstitutional, because it interfered with the right of Congress to legislate concerning patents.[11] In this case the court followed the opinion of Justice Davis to the same effect. In this latter case a statute required one selling within the State any article that was patented, to file with the clerk of the circuit court copies of the letters patent, on oath that they were genuine, and that he had authority to sell under them. Justice Davis held this statute void.[12]

Afterwards, this latter statute was held void by the Indiana Supreme Court.[13] Afterwards, these cases were expressly overruled.[14]

The case cited from Indiana,[15] was a suit upon a contract for a patent right. A number of cases similar to that has arisen in States where a statute was in force requiring notes given for a patent right to specify that they were so given, else they would be void into whomsoever's hands they might fall. In a number of States such a statute has been held invalid.[16]

But the Supreme Court of Pennsylvania has held such a statute valid,[17] and since the decision of Patterson v. Kentucky, there can be little or no doubt of its validity, and the correctness of the Pennsylvania decision.

A statute of the United States provided that any one who should sell, or mix for sale, any naptha and illuminating oils, or oil made of petroleum for illuminating purposes, inflammable at a less temperature than 110 degrees Farenheit, should be deemed guilty of an offense against the revenue laws, and be liable to conviction and punishment in the United States court. This statute was held unconstitutional on the ground that Congress had no power to prohibit trade within the States; but it was held valid so far as it affected territory under the exclusive control of the Federal government.[18]

The second point made in the principal case is, that a telephone company is a common carrier. In this the court is supported by the Ohio case.[19] It is very difficult to see how a telephone company in this respect differs from a telegraph company.[20]

All courts, however, have not acceded to the rule that they are common carriers; and some of them have denied it.[21]

Whether a telegraph company is a common carrier or not, will probably be settled by the United States Courts' decisions, because of questions arising of commerce between the States; and to these decisions the courts will eventually drift. Already that court has decided that such a company is a common carrier, subject to many of the liabilities of common carriers; and that it is subject to the regulating power of Congress in respect to their foreign and inter-State business.[22]

A telephone company being a common carrier, it may, therefore, be regulated by the legislature the same as any other common carrier; and this regulation by the legislature may extend to the amount of toll the company may charge for its services. Such legislation is not in conflict with the Constitution of the United States; does not impair the obligation of contracts, nor is it, usually, a regulation of commerce between

7 Welton v. State, 1 Otto 275; See Hannibal etc. R. R. Co. v. Husen, 5 Otto 465; Guy v. Mayor etc. of Baltimore, 10 Otto 434; Tiernan v. Rinker, 12 Otto 129; County of Mobile v. Kimball 12 Otto 691; Walling v. Michigan, 116 U. S. 446; Higgins v. Three Hundred Casks of Lime, 130 Mass. 1; State v. Farbush, 72 Me. 493; State v. North, 27 Mo. 464; Daniel v. Richmond, 78 Ky. 542; State v. Browing, 62 Mo. 591; State v. McGinnis, 37 Ark. 362; Scott v. Watkins, 22 Ark. 556; McGuire v. Parker, 32 La. Ann. 882.

8 Palmer v. State, 39 Ohio St. 236; S. C. 48 Am. Rep. 429.

9 State v. Telepeone Co., 36 Ohio St. 296; S. C. 38 Am. Rep. 585.

10 People v. Russell, 49 Mich. 617; S. C. 43 Am. Rep. 478.

11 Helm v. First National Bank of Huntington, 43 Ind. 167; S. C. 13 Am. Rep. 995.

12 *In re* Robinson, 2 Biss. 309; S. C. 4 Fischer, 187.

13 Grover & Baker Sewing Machine Co. Butler, 53 Ind. 454; S. C. 21 Am. Rep. 200; Walter A. Wood Mowing etc. Machine Co. v. Caldwell, 54 Ind., 270; S. C. 20 Am. Rep. 611; Breckbili v. Randall, 102 Ind. 528; S. C. 52 Amer. Rep. 695.

14 Fry v. State, 68 Ind. 532; S. C. 30 Am. Rep. 238; Toledo Agricultural Works v. Work, 70 Ind 253.

15 Helm v. Bank *supra.*

16 Cranson v. Smith, 37 Mich. 309; S. C. 26 Am. Rep. 514; 5 Cent. L. Jr. 386; Crittenden v. White, 23 Minn. 167; S. C. 23 Am. Rep. 676; Hollida v. Hunt, 70 Ill. 109; S. C. 22 Am. Rep. 63; State v. Peck. 25 Ohio St. 29; Woolen v. Banker, 6 Am. L. Rec. 236. See Pendar v. Kelley, 15 Amer. L. Reg. 511.

17 Haskell v. Jones, 86 Pa. St. 173; S. C. 5 W. N. 165; 5 Rep. 457.

18 United States v. DeWitt, 9 Wall. 41.

19 State v. Telephone Co., *supra.* See 10 Cent. L. Jr., 178, 438; State v. Nebraska Telephone Co., 17 Neb. 126; S. C. 24 Am. L. Reg. 262; See 11 Cent. L. Jr. 359; 38 Am. Rep. 587; 44 Am. Rep. 241; Louisville etc. Co. v. Am. etc. Co., 24 Al. 6 L. Jour. 283.

20 Western Union Tel. Co. v. Pendleton, 95 Ind. 12; S. C. 48 Am Rep. 692; Western Union Tel. Co. v. Blanchard, 68 Geo. 699; S. C. 45 Am. Rep., 480; Western Union Tel. Co. v. Ferris, 102 Ind. 91; McAndrew v. Electric Telegraph Co., 17 C. B. 3; Parks v. Alta California Tel. Co., 13 Cal. 422; New York etc. Tel. Co. v. Dryburg, 35 Pa. St. 298; S. C. 8 Amer. L. Reg. 490; Bowen v. Lake Erie Tel. Co., 1 Amer. L. Reg. (O. S.) 685; New York etc. Tel. Co. v. DeRutte, 5 Amer. L. Reg., 407; Graham v. Western Union Tel. Co., 10 Amer. L. Reg. 319; S. C. 1 Col. 230; Breese v. U. S. Tel. Co., 48 N. Y. 132; S. C. 45 Barb. 274.

21 Commrs. v. Western Tel Co., 6 Am L. Reg. 443; S. C on appeal, 1 Met. (Ky.) 164; 6 Am. L. Reg. 734; Birney v. N. Y etc. Tel. Co., 18 Md. 341; Western Union Tel. Co. v. Carew, 7 Am. L. Reg. 18; 15 Mich. 525; Western Union Tel. Co. v. Fontaine, 58 Geo. 433.

22 Pensacola Tel. Co. v. Western Union Tel. Co., 6 Otto, 1; Western Union Tel. Co. v. State of Texas. 15 Otto 460; S. C. 14 Cent. L. Jr. 448.

the States.[23] The regulation of the tolls may be by commission.[24]

So the legislature may prevent unjust discrimination in its rates; for this is nothing more than confirmatory of the common law.[25]

A number of decisions have been made upon questions whether a company, which has received a charter empowering it to regulate and charge tolls for its services, can be controlled by the legislature in the amount of its charges. Thus, where a charter of a railroad company conferred upon the company the power to regulate its tolls for a certain length of time, an act of the legislature regulating the same tolls during that time, was held unconstitutional.[26]

Yet where the charter of a railroad company provided that the company could "fix, regulate and secure tolls and charges" for its services, it was held that the legislature had not yielded up its power to control the rates thereafter.[27] This was upon the maxim of interpretation that grants of immunity from legitimate governmental control are never to be presumed; but the presumptions are all the other way.[28]

Whether or not a regulation of the amount of tolls that can be charged is a violation of the carrier's charter, must eventually depend upon the construction given to these clauses by the United States Supreme Court; because the validity of these limitations or statutes rests upon the question whether they violate the contract between the carrier and State embodied in its charter.

Thus the case of Illinois Central R. R. Co. v. Stone, cited above, was reversed on appeal. The act of incorporation of the company provided that the president and directors might "adopt and establish such a tariff of charges for the transportation of persons and property as they may think fit," and the same "alter and change at pleasure." It was held that this did not deprive the State of its power to act upon the reasonableness of the tolls and charges so adopted and established.[29] "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank v. Billings,[30] 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.'[31]"

Crawfordsville, Ind. W. W. THORNTON.

[23] Fry v. State, 63 Ind, 552; S. C. 30 Am. Rep. 238; Chicago etc. R. W. Co. v. Fuller, 17 Wall. 560; Olcott v. County Board etc. 16 Wall. 678; Chicago etc. R. R. Co. v. Iowa, 4 Otto 155; Reik v. Chicago etc. R. W. Co., 4 Otto 164; Chicago etc. R. W. Co. v. Ashley, 4 Otto 179; Winona v. Blake, 4 Otto 180; Blake v. Winona etc. R. R. Co., 19 Minn. 418; S. C. 18 Am. Rep. 345; Beekman v. Sar. & S. R. R. Co., 3 Paige 45; S. C. 22 Am. Rep. 679; Hudson v. State. 4 Zab. 718; Munn v. Illinois, 94 U. S. 113; S. C. 16 Am. L. Reg. 526; Carton v. Illinois Central R. R. Co.. 59 Iowa 148; S. C. 44 Am. Rep. 672; People v. Babcock, 11 Wend. 587; Illinois Central R. R. Co., v. People, 108 Ill. 541; S. C. 1 Am. & Eng. R. R. Co's. 188; Tilley, v. Savaunah, etc. R. R. Co., 5 Fed. Rep. 641; Huserman v. Burlington etc. R. R. Co., 16 Am. & Eng. R. R. Co., 46; Cincinnati etc. R. R. Co. v. Cook, 37 Ohio St. 265; S. C. 6 Am. & Eng. R. R. Co's. 317; Attorney General v. Chicagp etc. R. W. Co., 35 Wis. 425; People v. Boston etc. R. R. Co., 70 N. Y. 569.

[24] Georgia R. R. & Banking Co., v. Smith, 70 Geo. 694; *Re* R. R. Commrs., 15 Neb. 679; R. R. Com. v. Yazoo etc. R. R. Co., 21 Am. & Eng. R. R. Cas 6; Merrill v, Boston & Lowell R. R. Co., 21 Am. & Eng. R. R. Cas. 48.

[25] Chicago etc. R. R. Co. v. People, 69 Ill. 11; S. C. 16 Am. Rep. 599; Wabash etc. R. W. Co. v. People, 105 Ill. 236.

[26] Sloan v. Pacific R. R. Co., 61 Mo. 24; S. C. 21 Am. Rep. 397. See State v. Richmond etc. R. R. Co., 73 N. C. 527; S. C. 21 Am. Rep. 473; Philadelphia etc. R. R. Co. v. Bowers, 4 Houst. 506; Farmer's Loan etc. Co. v. Stone, 18 Cent. L. Jr. 472; See Illinois Central R. R. Co. v. Stone, 20 Fed. Rep. 408; S. C. 18 Am. Rep. 416; Hamilton v. Keith, 5 Bush. 458.

[27] Railroad Co. v. Natchez R. R. Co., 21 Am. & Eng. R. R. Cas., 17; See Laurel Fork etc. R. R. Co. v. West Va. Transportation Co., 25 W. Va. 324.

[28] Ruggles v. People, 108 U. S. 526; See U. S. v. Ruggler, 11 Am. & Eng. R. R. Cas. 49.

[29] Stone v. Illinois Central R. R. Co., 116 U. S. 347; Stone v. Farmer's Loan etc. Co., 116 U. S. 307; Stone v. New Orleans etc. R. R. Co., 116 U. S. 352.

[30] 4 Pet. 514, 561.

[31] Stone v. Farmer's Loan etc. Co., 116 U. S. 307, 325, 326.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY.—*Principal and Agent—Brokers—Compensation—Wagering Contracts — Margins.*— In the buying and selling of stocks upon margins, the brokers employed to conduct such transactions (under the law of Pennsylvania) are regarded as being engaged in wagering contracts, which the law of that State does not recognize, and they cannot recover in assumpsit for services rendered, or excess over the margin, where the *bona fides* of the transactions show them to have been of a wagering nature. *Stewart v. Garrett*, Md. Ct. App., May 14, 1886. Atl. Rep., Vol. 4, 399.

2. AMBASSADORS AND CONSULS.—*Act Fixing Salaries—Effect of Subsequent Acts Appropriating Less for Services.*—According to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments, which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words which expressly, or by clear implication, modified or repealed the previous law. *United States v. Langston*, S. C. U. S., May 10, 1886. S. Ct. Rep., Vol. 6, 1185.

3. CORPORATION. — *Consolidation — Existence — Laws—States—Contract—Policy—Const. Art. 16, § 7—Conflict of Law—Foreign Court—Decree—Property*—Although consolidating corporations of

two States are to be taken as one, yet that one has no legal existence in either State except by the laws of that State. No State will enforce a contract made elsewhere, repugnant to its policy, or injurious to its interest: and a contract made in New York for the issue of bonds and the creation of a mortgage by a corporation, in contravention of the constitutional prohibition of a fictitious increase of corporate debt, or without notice in Pennsylvania, will not be enforced. The decree of a foreign court cannot determine the validity of a mortgage on property in this State, or transfer any title. *Pittsburg etc. Co's. Appeal*, S. C. Penn., May 31, 1886. Atl. Rep., Vol. 4, 385.

4. CRIMINAL LAW. — *Evidence of Merchant as to Sale of Boots to defendant, relevant when—Practice Impeaching Witness as to Contradictory Statements—Effect of Failure to Object when Instructions are Given—Motion for New Trial based upon Previous Expression of Opinion by Juror.*—Evidence of a merchant to the effect that he had sold defendant boots and shoes and that the latter wore a number six, where there is other evidence showing that certain tracks found in the dust, where the crime is alleged to have been committed, were of that size is relevant. State v. Bobb, 76 Mo. 501. To impeach a witness as to contradictory statements alleged to have been made, his attention must be called to the time, place and person involved in such statement. He may be recalled by way of rebuttal to explain what was said. 1 Green. Ev. § 462. Where a defendant fails to object to the giving of instructions at the time, and for the first complaint of them in his motion for a new trial, the Supreme Court will not consider them (Henry C.J., dissents from this point.) Where the motion for a new trial is based on the fact that one of the jurors had expressed an opinion previous to the trial, of the defendant's guilt, and the affidavit of the person with whom the conversation was had, shows that the juror said: "From what he knew and heard he had both formed and expressed an opinion, and from his then knowledge and information he believed the defendant was guilty and that he would be in favor of sending him up for ten years," and where the jurors affidavit shows that he did have a conversation with such person, but that he did not use the language attributed to him; that he said "from what I have heard, I do not believe that I can be one of the jurors, because if the evidence should turn out like I heard it was, I think he ought to be sent up for ten years," where such juror further states that he never talked with any witness about the case; that he had conversed with no one about the facts except his wife and above affiant; that his wife told him what she had heard from another lady, and that it was the information thus received from his wife to which he he had reference in the above conversation, and where such juror is accepted, without objection on the part of defendant, after an examination in open court, with full knowledge on the part of defendant's attorney as to above conversation—Such juror is competent, and the information the juror had, was received from mere rumor, and he was without prejudice or bias. *State v. Reed*, S. C. Mo., June 7, 1886.

5. ——— ———. *General Verdict on Two Counts—General Instruction where there are Two Counts—Stealing and Receiving Stolen Property—Conviction on Either Count.*—On an indictment containing two counts; one for stealing, the other for receiving stolen property, it is improper, though not reversible error, for the court to instruct the jury that if they found the defendant guilty they must designate upon which count of the indictment they so found. A general verdict in such cases would be sustained, and it is often difficult to determine of which offense the party is guilty when there is no doubt of his guilt of one or the other. A general instruction that possession of property, which is shown to have been recently stolen, if unexplained, is evidence or guilt, is not erroneous, the court not being asked to confine the instruction to the first count of the indictment. Where the defendant is found in possession of stolen property, and the proof shows his possession to have been a guilty possession, slight circumstances may authorize a jury to determine whether he has been guilty of the theft, or of receiving the property knowing it to have been stolen. A conviction for receiving stolen property is good, although a conviction for stealing would have been sustained by the same evidence, if the jury so found. *Cook v. State*, S. C. Tenn., June 12, 1886.

6. DEED.—*Construction.*—Where the premises of a deed contain an express grant to a man and his heirs for a term of years, then the limitation for a term will qualify and lessen the grant in fee. The intention of the parties to a deed is to be ascertained from the entire instrument, not from any particular words or phrases without references to the contract, and the instrument shall operate according to the intention, unless it be contrary to law. It is plain that the grant in this case is for a term of years. *Berridge v. Glassey*, S. C. Penn., May 1886. Pittsburg L. Jour. (N. S.) V. 16, 452.

7. DIVORCE.—*Domicile of Wife—Evidence — Jurisdiction of Parties—Residence—Denial Construed —Cohabitation.*—The general rule is that the domicile of the wife follows that of the husband. This is based upon the unity of husband and wife, and generally implies continuing, though temporarily interrupted, cohabitation. Proof of the domicile of the husband is sufficient, *prima facie*, to establish that of the wife. A divorce procured in Salt Lake City while neither of the parties was a resident of the territory, is null and void. To give the court jurisdiction in an action for divorce, at least one of the parties must be a *bona fide* resident of the State or territory where the action was brought. A denial in the language of the petition "that defendant denies that said marriage was unlawful and wrongful, and denies that he has cohabitated with L. W. S.," etc., "in a state of adultery," is not a denial of the cohabitation. *Smith v. Smith*, S. C. Neb., May 27, 1886. N. W. Rep. Vol. 28, 296.

8. EJECTMENT—*Both Parties Claiming Under Common Source—Plaintiff may prove Common Source by Defendant — Secondary Evidence—Practice—Waiver of Insufficiency of Answer.*—1. In ejectment where plaintiff and defendant claim through a common source of title, it is sufficient for the plaintiff to deduce his title from the common source of title. It is sufficient for plaintiff to show prior possession as owner, either in himself or grantor, and if it appears that defendant holds under the common grantor it is unnecessary to go further· the title of the common grantor is acknowledged, and so far, the rule that the plaintiff must recover on the strength of his own title is departed from. Hence, unless the defendant can trace his title or right to the true owner, if such

common grantor is not the true owner, or can show a better title to the interest of such grantor, the plaintiff must prevail. 2. Plaintiff may prove the common source of title by the defendant. 3. A sufficient foundation for the introduction of secondary evidence is laid where it is shown that the original deeds are lost or not in control of the party, and where it appears that the public records have been destroyed by fire, resort to secondary evidence to establish what the lost records would show is permissible, and the abstract and index to the record of deeds required to be made by §§ 3816 and 3819, Rev. Stat. Mo., 1879, are competent evidence for this purpose. 4. Where answer of defendant only denied the "material allegations" of petition, and where no objections at trial are taken, the Supreme Court refused to consider it. 73 Mo., 57; 81 Mo., 275. *Smith v. Lindsey*, S. C. Mo., June 7, 1886.

9. ESTOPPEL—*Judgment—Res Adjudicata—Mortgage—Consideration—Extension of Time—Vendor and Vendee—Bona Fide Purchaser—Lis Pendens.*—Matters that have been adjudicated in a former suit will not be considered in a second action, Where, at the time of the execution of a promissory note by the husband, he agreed that his wife should execute a mortgage on certain real estate possessed by her, to secure the same, which mortgage, a few days afterwards, was duly executed and acknowledged, and by reason of which the credit on the note was extended two years, *held*, that there was a sufficient consideration for the mortgage. Where a person purchases real estate while an action is pending to subject the property to the payment of a certain debt, the purchaser is chargeable with notice of the claim, and, whatever the form of the decree under the issue made by the pleadings, takes subject to same. *Nelson v. Bevins*, S. C. Neb., May 27, 1886, N. W. Rep. Vol. 28, 331.

10. EVIDENCE—*Admissions—Judgments — Conclusiveness—Laches.*—When the admission of a party is the foundation of a claim asserted against him, the whole of his statement must be taken together. The unreversed judgment of a court of competent jurisdiction is conclusive, and cannot be collaterally attacked. Wimbish v. Breeden, 77 Va., 324. A case in which, from the lapse of time, death of parties, destruction of records, and loss of papers, there can no longer be a safe determination of the controversy, and the *status* should not be disturbed. *Perkins v. Lane*, S. C. App. Va., May 6, 1886, Va. L. J. Vol. 10, 411.

11. ——*Declarations as part of Res Gestæ*—Declarations of the engineer of a railroad train, made five minutes after an accident occurred, and after a child who was run over by the train had been removed from under the car, and carried away a quarter of a mile or more, are not admissible in evidence, against the defendant railroad company, as part of the *res gestæ*, for the purpose of showing the negligence of the engineer. *Durkee v. Central, etc. Co.*, S. C. Cal., May 18, 1886, Pac. Rep., Vol. 2, 130.

12. FIXTURES—*Mortgagor and Mortgage—Vendor and Vendee.*—In determining the character of chattels annexed to the freehold—whether they are removable or irremovable as fixtures—the same rules prevail as between mortgagor and mortgagee, as between vendor and vendee, with possibly a more liberal application in favor of the mortgagee; and the time of annexation, whether before or after the execution of the mortgage—is immaterial, except that when an article is annexed subsequently, and is of doubtful nature, stronger evidence of an intention to change its character is required. To convert a chattel into a part of the realty, or an irremovable fixture, there must be—first, actual annexation to the land, or to something appurtenant thereto; second, application to the use or purpose to which that particular part of the realty is appropriated; and, third, an intention by the party annexing it to make a permanent accession to the freehold; though a chattel which is permanently annexed, and which cannot be severed without material injury to the premises, becomes a part of the realty, irrespective of the intention of the party annexing it. An upright steam engine, resting on brick or plank on the ground, and sustained in place by its own weight, being connected by a band with a gin in a house about eight feet distant, and used to furnish motive power for ginning cotton, both for the owner and for other persons for toll, being erected by the mortgagor subsequent to the execution of the mortgage, and having a house erected over it on sills resting on the ground, so that it cannot be removed without breaking or removing the house, is *prima facie* a chattel, but becomes a part of the realty if so intended by the party erecting it; and the question of intention under these circumstances, by which its character is to be determined, must be submitted to the jury. *Tillman v. Delaney*, S. C. Ala., May 9, 1886.

13. HOMESTEAD—*Abandonment—Writing not Necessary — Removal — Intent — Husband's Intent Governs.*—There may be an abandonment (without any writing) of a homestead which will terminate its existence and exemption. An actual removal from a homestead, without any intent to return to it as a home or place of abode, constitutes an abandonment. As head of the family, it is for the husband to determine and fix the domicile of the family, including that of the wife; so that when he and his wife remove from a homestead, he having no intention of returning, that fixes the character of the removal as an abandonment. *Williams* v. *Moody*, S. C. Minn., June 1, 1886, N. W. Rep. Vol. 28, 510.

14. HUSBAND AND WIFE—*Wife's Separate Estate—Business—Constable.*—Where a *feme covert*, her husband having been sold out by the sheriff, carries on his business with her separate estate, gives him money with which to buy a horse, which not being sufficient, he borrows more as her agent, the horse having been levied on for his debt, there is no fact sufficient to constitute legal fraud, and the constable who made the sale, after receiving notice that the horse was hers, was liable. *Tibbins v. Jones*, S. C. Penn., May 24, 1886, Atl. Rep. Vol. 4, 383.

15. JOINT TENANTS AND TENANTS IN COMMON.—*—Adverse Possession— Co-Tenant — Evidence—Presumption*—Although the possession of a tenant in common is not necessarily adverse to his cotenant, it may yet be regarded as such where one holds possession under a claim of entire ownership, and his co-tenant has knowledge of it. It is not necessary to show by direct and pointed evidence that the co-tenant has such knowledge. It is sufficient if it is not shown otherwise, and the circumstances are such that it may reasonably be

presumed that the co-tenant has such knowledge. *Knowles v. Brown*, S. C. Iowa. June 9, 1886, N. W. Rep., Vol. 28, 409.

16. JURY.—*Question of Fact—Attorney—Employment—Interest—Mortgage.*— Where an attorney received payment of interest on a mortgage, evidence of his employment by the mortgagee, to whom he never accounted, in a prior transaction, and of the fact of his acting as such at the time, was sufficient to put to the jury. *McMahon v. Bardinger*, S. C. Penn., March 8, 1886, Atl. Rep., Vol. 4, 379.

17. LIEN.—*Landlord and Tenant—Devise—Infant—Laches — Guardian and Ward — Insolvency — Equity.*—The lien given by statute to a landlord or his assignee, on the crops grown on the rented premises, for the rent of the current year (Code, § 3467), only attaches when the relation of landlord and tenant exists between the parties; and although this relation may be either created by express contract, or implied from the conduct of the parties towards each other, it will not be inferred from occupation merely, when the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause. Where lands are devised to infant children, their father being appointed executor and trustee, with power to manage and control the property for them; whatever may be his liability to them, in a proper proceeding, for rents and profits, the relation of landlord and tenant does not exist between them, and they have no statutory lien on the crops raised by him, received and sold by his administrator. As a general rule, laches will not be imputed to an infant, and his rights are not waived by a failure to assert them promptly. But there are cases in which his rights may be lost by the failure of his guardian to assert them, leaving him only the personal liability of his guardian for indemnity. Although the statute contemplates that all personal property, not specifically exempted, shall be included in the administrator's inventory, and that a selection of exemptions may be made from the property so inventoried; yet a selection may be made from property not included in the inventory, and even before an inventory is returned. Where an infant's guardian selected for him, as exempt, all the personal property included in the inventory, which was appraised at $400; and the administrator afterwards received and sold other personal property, and, the estate being afterwards declared insolvent, accounted for the proceeds on settlement of his accounts as the administrator of the insolvent estate; on which settlement the infant was represented by a guardian *ad litem*, and no additional claim of exemption was made; the surety on the administrator's official bond is not liable to the infant for the loss of any additional exemptions to which he might have been entitled. To justify the removal of the settlement of an insolvent estate into equity, requires a clear and strong case—a case requiring relief which the probate court, on account of its want of equitable jurisdiction, cannot grant. *Hardin v. Pulley*, S. C. Ala., May 9, 1886.

18. MALICIOUS PROSECUTION.— *Probable Cause—Case at Bar.*—Upon complaint of R., B. is taken before a justice and adjudged guilty of petit larceny, and sentenced; upon appeal, this judgment is reversed and B. is adjudged not guilty, and is discharged. B. then brings an action for malicious prosecution against R. *Held*, that the judgment of the justice is only *prima facie* evidence of probable cause for the prosecution. Womack v. Circle, 32 Gratt. 324, overruled. *Blanks v. Robinson*, Sup. Ct. App. Va., April 8, 1886, Va. Law Jour., Vol. 10, 398.

19. MASTER AND SERVANT.—*Liability of Employer for Acts of Agent or Contractor—Trespass—Liability of Employer for Tort of Employee—Intent with which Act Done.*—The defendants were authorized by the land agent to guard certain lots, reserved for public uses, against trespassers, but had no right or authority to grant permits to parties to take timber therefrom. The defendants, nevertheless, supposing they had such authority, gave permits to certain parties to take off the hemlock bark and timber upon those lots, and these contracts were assigned to other parties, who subsequently peeled the bark, and cut down and carried away a portion of the timber. In an action of trespass against the defendants, *held* that, having authorized the commission of the trespasses, they were liable for the damages caused thereby. An employer is responsible for the wrong done by a contractor or his servants in the execution of a wrongful or illegal act, though not of a legal act. The intent of the defendants was entirely immaterial. *State v. Smith*, S. Jud. Ct. Mass., May 25, 1886, Atl. Rep., Vol. 4, 412.

20. MORTGAGE ABSOLUTE.— *Deed — Defeasance—Evidence.*—To convert a deed absolute on its face into a mortgage, by parol testimony, such testimony must be clear and specific, of a character such as will leave in the mind of a chancellor no hesitation or doubt; and, failing this, the effort to impeach the legal character of the deed must be regarded as abortive. *Lance's Appeal*, S. C. Penn., May 24, 1886, Atl. Rep., Vol. 4, 375.

21. MUNICIPAL CORPORATIONS.—*Taking Land for Sewer Purposes—Nuisance—Consequential Damages.*—Commissioners appointed by the court to appraise the damages for the taking of land for sewer purposes by an incorporated village have power to award damages only for the actual taking of land, and not consequential damages resulting from a nuisance created by the discharge of sewage, when the village charter prescribes no rule for the assessment, and does not determine what shall constitute elements of damage. *Stewart v. Rutland*, S. C. Vt., June 10, 1886, Atl. Rep. Vol. 4, 420.

22. NEGLIGENCE.—*Defective Highway — Necessary Elements to Sustain Action for Injuries, Facts must Warrant Instructions—Punitive Damages, when Recoverable— Opinion of Witnesses as to Condition of Highway Inadmissible—Condition is Fact for the Jury.*—1. To maintain an action for injuries caused by a defect in a highway it must appear affirmatively, and the burden of proof is upon plaintiff to show that the road was a highway; that the defect actually existed; that defendant was in fault for not repairing, and that plaintiffs' injuries was caused by such defect. Shearm. & Red. on Neg., § 321 (3d ed). 2. It is error to give an instruction, that plaintiff can recover, and for the jury to award punitive or exemplary damages, where the facts in evidence do not warrant it. 62 Mo. 326; 51 Id. 316; 59 Id. 27. 3. Where there is nothing in the evidence to show that defendant's

failure to remove certain obstructions on the highway which contributed to the cause of the injury, was either wanton or malicious, it is improper to award punitive damages. 4. Witnesses cannot give their opinion as to whether a roadway was in such condition as to afford a safe and convenient track for the passage of wagons and travelers, as that is not matter of expert testimony, and the jury must find this fact. *Brown v. Cape Girardeau Plank Road Co.*, S. C. Mo., June 7, 1886.

23. PRACTICE—*Continuance—Absence of Witness—Materiality—Exceptions—Skeleton Bill — Insertion of Evidence.*—Held, in an action upon a fire insurance policy to recover loss, that admissions by the plaintiff that the property was of much less value than the damages claimed, were material, and that in the circumstances of the case the court erred in refusing a continuance on the ground of the absence of a witness. In a skeleton bill of exceptions, directions given to the clerk in regard to the insertion of the evidence in these terms, "Clerk, here insert the evidence," is not sufficient, and the evidence inserted must be stricken from the abstract. *Parks v. Council Bluffs. etc. Co.*, S. C. Iowa, June 10, 1886, N. W. Rep., Vol. 28, 424.

24. ———. *Motion to Quash Execution, Must be Made in County Where Judgment was Rendered.*—Where a judgment is obtained in S. county and an alias execution is issued thereon, directed to the sheriff of county, B., returnable to the Circuit Court of the former county, and the sheriff of County B. levied the execution upon lands in that county and advertised the same for sale, and where the defendant files a motion in the Circuit Court of County B., to quash the levy, the Circuit Court of County B. has no jurisdiction to hear such motion, the proper forum being County S., where the judgment was obtained. 17 Mo., 603; 23 Mo., 19; 11 Mo., 411; 44 Mo., 415; 65 Mo., 446. *Mellier v. Bartlett*, S. C. Mo., June 7, 1886.

25. SALES — *Conditional Sale — "Satisfactory"—Obligations Imposed by the Word—Warranty—Conditions Must be Observed Before it may be Availed of.*—If an article is delivered to a purchaser, to be retained and paid for by him if satisfactory, the purchaser may repudiate the sale if such article prove *bona fide* and in fact unsatisfactory. If, accompanying a sale, there is a warranty that the article, if set up in a certain manner and location, and operated a certain way, will prove satisfactory, and if such warranty is accepted as part of the contract of sale before advantage can be taken of it, the purchaser must have tested it after it has been set up in such manner and location and tested in that way. *Exhaust. etc. Co. v. Chicago, etc. Co.*, S. C. Wis., May 15, 1886, N. W. Rep., Vol. 28, 343.

26. TELEGRAPH AND TELEPHONE COMPANIES—*Principal and Agent—Error in Transmission—Evidence—Purchase on Faith of Telegram—Condition Against Liability—Burden of Proof.*—The principal may maintain an action against a telegraph company for an error in transmitting a telegram from his broker. Evidence by the plaintiff that a telegram, as received, directed him to purchase at a certain price, is competent as tending to show his good faith in making the purchase at the price, and that he acted upon the dispatch in making his purchases. Where a telegram is written upon a form provided by the telegraph company, which contains a printed condition to the effect that the company "shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same," the plaintiff, to recover from the company, must show that the mistake was caused by the fault of the defendant, and that it might have been avoided, if the defendant's instruments had been good ones, and if the defendant's agents had possessed the requisite skill, and exercised the proper care and diligence in respect to the transmission and receipt of the message in question. *Akin v. Western, etc, Co.*, S. C. Iowa, June 10, 1886, N. W. Rep., Vol. 28, 419.

27. VENDOR AND VENDEE—*Carrier—Instructions—Delivery.*—Where goods, ordered and contracted for, are not delivered directly to the purchaser, but are delivered by the vendor to a carrier, with proper instructions, for transportation as directed by the purchaser, the goods when delivered to the carrier are at the risk of the purchaser and the property is vested in him, subject to the vendor's right of stoppage *in transitu*. An instruction by a purchaser to the vendor to ship goods to care of certain shipping merchants, who were agents and managers of a certain well known steamship line, "for their next steamer," means that the goods are to be transported by a ship of their line, and not by any ship which would accept freight from them. A change in direction to the carrier by the vendor relates back to and qualifies the original delivery of goods to the carrier by the vendor; and when such a change in direction is a departure from the instructions given by the purchaser, and the goods are lost *in transitu*, the vendor cannot recover their value from the purchaser. *Wheelhouse v. Parr*, S. J. Ct. Mass., May 8, 1886, N. Eng. Rep., Vol. 2, 150.

28. ———. *Warranty—Description—Mistake — Deceit.*—When there is no bad faith, or willful misrepresentation or imposition by a vendor, and no warranty of the quantity of land conveyed, the delivery and acceptance of the deed, payment of part consideration and delivery of bond for the balance, close the transaction, and the vendee is precluded from setting up a deficiency in the quantity of land as against his bond. In this case it is held that a deficiency of 1.67 foot in a line of 20 feet is not so gross as to be evidence of deceit. It is a mere mutual mistake, with equal opportunity to both parties to have had corrected, which will not be relieved against. In an action for purchase money of land the defendant cannot resist on the ground of failure of title to part of the land sold, if he has disabled himself from placing his vendor in *statu quo* by conveying the title to a third party. *Rodgers v. Olshoffsky*, S. C. Penn., May 1886, Pitts. L. J. (N. S.), Vol. 16, 455.

29. WILL—*Ademption of Legacies—Intention—Evidence.*—In the matter of ademption of legacies, whether the advance made was intended as an ademption or not can only be gathered from the circumstances surrounding each individual case; the law in regard to the same being well settled, and the only difficulty being in its application to a given state of facts for which purpose parol evi-

dence may be adduced. *Wallace v. Dubois*, Md. Ct. App., March 10, 1886, Atl. Rep., Vol. 4, 402.

30. WILL.— *Testamentary Capacity — Evidence — Undue Influence—Insanity.*—On the question of undue influence the proponent of the will may show that nominal legacies to heirs other than children were inserted at the suggestion of the person who wrote the will, because he erroneously supposed it necessary to the validity of the will. When portions of a deposition are read by one party for the purpose of contradicting the witness who gave it, the other party may read from the same deposition so much as pertains to the same subject— and tends to explain, qualify or limit what is so read. The practice of requiring an executor, upon the issues of insanity and undue influence, to call all the subscribing witnesses to the will, if alive, sane and within the jurisdiction, should not be departed from without good cause. Whether a party shall be allowed to put leading questions to his own witness is determined by the presiding justice while the examination of the witness is going on before him, and is not matter of exception. The common-law rule forbidding a party to discredit his witness has no application when the party, by legal intendment, has no choice, as in the case of an attesting witness. Upon the issues of insanity and undue influence, declaration of the testator tending to show the state of his feeling toward relatives, to whom he gave only a nominal sum, may be received. A request for instructions to the jury, which, in effect, assume as matter of law what should be left to the jury as matter of fact, is properly denied. A request for instructions, which in effect require the proponent of a will to explain why the testator made it as he did, is properly denied. *Whitman v. Morey*, S. C. N. H., March 12, 1886, East. Rep., Vol. 5, 187.

31. ———. *Life-Estate—Power of Disposition—Remainder.*— The testator left the following will: "After my lawful debts are paid and discharged, I give, bequeath, and dispose of as follows, to-wit: To my beloved wife, Margaret Jones, all that is in my possession at the time of my decease; and also my wife have right to sell the estate, if that will be her choice. And after my wife's decease, the property to be parted to my dear children in equal shares." *Held*, that Margaret took, under the will, only an estate for life in the property of the testator, with power to sell such life-estate, if she chose to do so, and her children took, in equal shares, a vested remainder in fee in such property. *Quære.* See Jones v. Bacon, 68 Me. 34; Howard v. Carusi, 3 Sup. Ct. Rep. 575; McClellan v. Turner, 15 Me. 436; VanHorn v. Campbell (N. Y.), 3 N. E. Rep. 316. *Jones v. Jones*, S. C. Wis., May 15, 1886, N. W. Rep., Vol. 28, 177.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]*

QUERIES.

2. In Texas an administrator bought land with funds belonging to the estate he then represented, and caused the deed to be made to him personally, and held the property as his own. Can the county court, where the administration is pending, declare the trust and vest the title in the heirs in a proceeding for partition of the estate? TEXAS.

3. Husband and wife living together, wife gives husband money (not for household expenses), there being no contract to repay; under laws of Michigan can wife maintain action against husband as for money had and received. SUBSCRIBER.

Milwaukee, Wis.

4. A. and P., lumber and material men, contract with D. to furnish material to fence a certain lot in town (owned by D.); the material was furnished, as per contract, and the fence erected, but before paying for the material, and within ten days after the improvements are finished, D., (who is insolvent,) secretly conveyed the property to E., who is an innocent purchaser for value. Will the fact that E. is an innocent purchaser, defeat the right of A. and B. to a lien as material men in Missouri, under § 3172, R. S. Mo? See also §§ 3174, 3178, R. S. Mo. C. B. A.

5. In Iowa, at a sale of school land, A. purchased 80 acres, and on paying one third in cash, received from the county auditor a contract for a deed. A. assigns his contract to B., but A.'s wife does not sign the contract of assignment. The land was never occupied by A. as a homestead. Can A.'s wife claim and have assigned to her dower on the death of A., or will the mere assignment of the school land contract by A. cut off her dower interest? Cite authorities. R. F. M.

6. A. B. C. and others, sign a petition for dramshop license under the provisions of § 5442, R. S. 1879, amended 1883, petition is filed in advance of time required by law. A. B. and C. desire afterwards to have their names erased from, or held for naught, in said petition. Will the filing of a counter-petition or written order to the court by them for this purpose before action had in original petition, effect this? No strict rule of pleading required in county courts. H.

QUERIES ANSWERED.

Query No. 48. [22 Cent. L. J., 551.] A. sues B. for work and labor alleging an indebtedness of $45.75, after all payments and set-offs. B. makes general denial thereto, then produces account book and offers to prove full payment. Query: Is such evidence admissible under the Kansas code which requires set-off to be especially pleaded. J. M.

Answer.—When the action is not based on the original agreement, but is brought for balance after deducting payments and off-sets, the truth of plaintiff's averment is put in issue by denial and proof of payment allowed, it not being new matter. Bliss on Code Pleading, § 357. But in a suit on original agreement, proof of payment is treated as new matter, and evidence of it cannot be allowed under a denial. Bliss on Code Pleading, § 358; Stevens v. Thompson, 5 Kans. 305; Clark v. Spencer, 14 Kans. 398. I can not see how the question of set-off enters into the matter.

A. W. L.

Query No. 46. A. owned a mill property in his own name and right worth $6,000 and upon which there was an outstanding mortgage of $2,000 held by C. A. and his wife, B., in March, 1882, conveyed to D., by warranty deed, the undivided one-half thereof for $3,000, and received the purchase money. In October, 1882,

A. and his wife, B., conveyed the other undivided half to H., subject to one-half of the outstanding mortgage. Shortly afterwards he, A., paid one-half the amount of mortgage (in order to make his title good to D.), but the payment was indorsed by C. as a general credit of that amount. Afterwards C. foreclosed, and the whole mortgage premises were bid in by B., the wife of A. Can she hold the title thus acquired as against D., the purchaser of the undivided one-half under a warranty deed, made by her and husband? The husband being insolvent since the conveyance. Cite authorities. W.

Indiana.

Answer.—The decisions upon the proposition as to whether a *feme covert* is bound by the covenants in a warranty deed given by her husband in which she joins to convey or release her dower are conflicting; most of the cases examined hold, that while the covenants (under the circumstances stated above) estop a woman from setting up any claim of title she had at the time she signed the deed, she is not, however, estopped from setting up an after acquired title. This is the law in New York, as shown in Jackson v. Vanderheyden, where it was held that "a covenant of warranty does not estop the wife from setting up a subsequently acquired interest in the lands in the conveyance of which she had joined. This same doctrine is followed in New Hampshire and is the settled rule there, 6, N. H., 117.

"Although competent to join with her husband in executing a conveyance of her land, a wife's covenant's of warranty and of title though in the same deed are not binding upon her." 3 Washburn on Real Property, 260.

When a wife joined with her husband in a deed by relinquishing her rights of dower in the granted premises, though it estops her from claiming dower, it would not prevent her from claiming a subsequent by acquired title. 3 Washburn on R. P., 114, also 50 Illinois 37 Dean v. Shelby 57 Pa. St. 426, 6 Iowa 137 and 20 Iowa 431, opposed to this doctrine are Hill v. West 8 Ohio 222 and Nash v. Spofford, 10 Met. 192.

S. L. LAX.

RECENT PUBLICATIONS.

THE ADJUDGED CASES ON DEFENCES TO CRIME. Vol. V., including special defenses to crimes against the property and persons of individuals, viz.: Forgery; Fraud and False Pretenses; Larceny; Receiving Stolen Property; Robbery; Abduction; Seduction; Assault; Assault and Battery; Assault with Intent; False Imprisonment; Rape and Homicide. With notes. By John D. Lawson. San Francisco: Sumner Whitney & Co., Law Publishers and Law Booksellers. 1886.

This is the concluding volume of the series which Mr. Lawson has prepared with so much labor, and such thorough knowledge and diligent investigation of the subject in hand.

We reviewed the fourth volume of this series in a former number of the JOURNAL (vol. 22, p. 479), and we can only add our conviction of the value of the work, and repeat what we have already said, that it "will doubtless prove of great value to the counsel for the defense."

COMMENTARIES ON THE LAW OF ESTOPPEL AND RES JUDICATA. By Henry M. Herman, Counsellor-at-Law, author of the "Law of Executions," "Chattel Mortgages," etc. "*Omne jus qno utimur vel ad personam pertinet, vel ad res, vel actiones.*" In two volumes. Jersey City, N. J.: F. D. Linn & Company. 1886.

This is not a new edition of the author's former work on this subject, nor yet a reproduction of it in an improved form. It is more properly, as he explains in his preface, a new work on the same subject, the production of which he conceives is justified by the immense growth of case law on the topics treated, which has taken place within the fifteen years that have elapsed since the publication of his first work. The book is manifestly the result of great labor, the author having cited no less than sixteen thousand cases, the treatment is thorough and conscientious, and the arrangement very good. It is divided into three books, the first devoted to Estoppel by Judgment, or other matter of record; the second to Estoppel by deed or other written matter; the third to estoppel *in pais* and equitable estoppel. The matter contained under these topics are judiciously subdivided into twenty chapters, of which the first treats of the general principles of law controlling the subject; the second of Estoppel by record; the third of personal judgments as between parties; the fourth of judgments *in personam;* the fifth of judgments *in rem*;; the sixth of judgments of courts of limited jurisdiction; the seventh of foreign judgments. The eighth, which opens the second book, treats of Estoppel by deed or other writing; the ninth is devoted to the subject of recitals; the tenth to title by Estoppel; and the eleventh to leases by Estoppel. The third book opens with the twelfth chapter, which treats of Estoppels *in pais* and Equitable Estoppels; in the thirteenth are considered Equitable Estoppels in their relations to landlord and tenant, vendor and vendee, bailor and bailee; the fourteenth specially applies the doctrine of Estoppel to mortgages; and the fifteenth to the title to land. The sixteenth chapter treats of the doctrine of Equitable Estoppel as applied to written instruments; and the seventeenth to the doctrine as affecting or applied to election, ratification, acquiescence, as well as to certain personal relations as principal and agent, etc. The eighteenth chapter treats of the application of the doctrine to the matters of boundaries, easements, possession, partition, etc.; and the nineteenth to the doctrine as affecting corporations. Finally, the twentieth chapter shows how Estoppel can be made available, when it must be pleaded specially and when it can be given in evidence under the general issue.

The work is well worthy of Mr. Herman's high reputation, and we heartily commend it to the profession.

JETSAM AND FLOTSAM.

WOMEN'S RETORTS.—Lawyers not unfrequently receive the most provoking retorts from women whom they are trying to confound. A counsel defending a prisoner on trial, before an English court, for stealing money, began his cross-examination of the principal witness, a woman, by saying:

"Tell me, my good woman, what sort of money had you?"

"I had eight shillings in silver, and a sovereign in gold."

"Tell me, my good woman," continued the lawyer, with a sneer, intended to confuse the witness, "did you ever see a sovereign in any thing else than gold?"

"O, yes, sir," answered the woman, with a calm smile; "I saw Queen Victoria, God bless her!"

"Madam," said a course lawyer, baffled in his attempt to make a cool witness contradict her statements, "you have brass enough to make a saucepan."

"And you have sauce enough to fill it," she retorted.

JUDGE AND PARSON.—Lord Chancellor Kenyon was so noted for his penuriousness that a wit said: "In his lordship's kitchen the fire is always dull, but the spits are always bright." "Spits!" rejoined a witty friend, "in the name of common-sense don't talk of Kenyon's spits, for nothing turns upon them!"

An Irish Chief-Justice, St. George Caulfield, was also notorious for his parsimony. Though a gentleman of fortune, he was never known to give a dinner party but once. A gentleman, holding an important government office, happened to pass near the chief-justice's residence, and the penurious judge was obliged to invite him to become his guest.

The official accepted, and the neighboring gentlemen were invited to meet him at dinner. Among them was the witty rector of the parish, who, being asked to return thanks, when dinner was over, did so in words as impertinent as irreverent.

"We thank the Lord, for this nothing less
Than the fall of Manna in the wilderness;
In the house of famine we have found relief,
And known the comforts of a round of beef;
Chimneys have smoked that never smoked before,
And we have dined where we shall dine no more."

The chief-justice pretended to enjoy the joke, and on a subsequent day, asked the parson to take a frugal dinner with him. When the covers were taken off, there was nothing in the dishes.

"May I ask you, reverend sir, to say grace?" asked the chief-justice, with a malicious smile. The parson, rising to the occasion said:

"May He who blessed the loaves and fishes
Look down upon these empty dishes;
For if they do our stomachs fill,
'Twill surely be a miracle."

In the preface to "Fortescue's Reports," which consists of thirty-one folio pages, it is said that "the grand divisions of law is into divine law and the law of nature; so that the study of law in general is the business of men and angels. Angels as well as men may desire to look into both the one and the other, but they will never be able to fathom the depths of either." This classification of law students it will be observed leaves out the "third estate"—devils. The omission is probably correct, as those personages are generally supposed to know from experience much more of the penalties of the law than is entirely agreeable to them.

LEGAL—A legal adjustment of differences was sometimes very difficult for a man to obtain in the early days of California, as it is elsewhere at times, owing to local peculiarities.

Two Mexicans who had been lucky in digging, disputed the possession of an aged mule, not worth her keeping. The case was brought before a learned magistrate named Muggins, who, before listening to the trial, demanded that each claimant should pay three ounces of gold-dust for "cost of court."

Each party was then allowed to state his side of the case in his native language, of which Judge Muggins did not understand a word. This done, his Honor informed them, through an interpreter, that the case must be decided by a jury.

Two ounces more having been paid to meet the "extra expense," twelve good men and true were summoned. These persons decided that the evidence was so conflicting that neither man owned the mule, but that, in strict justice, the plaintiff and defendant should draw straws for the bony beast. The foreman furnished the straws without extra cost, and amid a breathless silence, the Mexicans drew lots.

The die was cast, and the case decided, but when the winner went proudly forth to claim his quadruped, it was discovered that a more subtile "Greaser" had stolen the mule.

UNPRINCIPLED.—Lord Chancellor Thurlow was noted for rough mental vigor, coarse manners, shocking profanity, and hard drinking. He had little principle, and considered politics as a game by which clever men advanced themselves. The tricky nature of the man, and his shrewdness, also, are shown by the manner in which he procured a horse, when he began the practice of the law. He was so poor that he was perplexed as to how he should secure one on which to ride the rounds of the courts.

As his perplexity did not include the slightest scruple as to the morality of the means, he went to a horse-dealer, and, in the tone of a man who could buy every horse in the stable, said: "Show me, sir, a horse that you can recommend for riding, and if I like him after trial, I'll take him at your own price."

The young barrister was immediately mounted on the best saddle-horse in the stable. He rode away, and the trial, which the dealer thought might extend until night, lasted for several weeks. When the dealer again looked upon his property, the horse had carried Thurlow to every town in the circuit. With the animal, the owner received this note: "The horse, though he has some good points, does not altogether suit me."

Once, while Thurlow was Lord Chancellor, an attorney appeared before him to make proof of a death. "Sir, that is no proof," answered the Chancellor to every statement made by the lawyer.

"My lord," at last exclaimed the vexed attorney, "it is very hard that you will not believe me. I knew the man well. I saw him dead and in his coffin. He was my client."

"Good heavens, sir!" sneered the rude, brutal Chancellor. "Why did you not tell me that before? I should not have doubted the fact one moment, for I think nothing would be more likely to kill a man than to have you for an attorney."

Yet this rough, tricky, immoral man was for years the despot of the House of Lords, and the personal confident of George the Third, the most religious of all the Georges. He secured the sovereign's favor by his uncompromising advocacy of the royal prerogative, and his strong denunciations of the rebellious Americans.

In public, he shed tears at the approach of the king's insanity, but in the royal cabinet, he treated his feeble-minded master as if he was a boy.

Once, when Thurlow had brought to the king a number of acts of parliament for him to read and sign, the sovereign showed some dullness of perception.

"Your majesty," said the coarse chancellor, "it's all nonsense trying to make you understand these acts, and you had better consent at once to all of them."

The world moves. The English would not now endure a George III., much less a George IV., nor would they tolerate for a single parliament the insolence and immorality of a Thurlow. Within a few weeks, the career of a popular leader, a man of wealth and position, has been terminated, because he stood morally, though not legally, convicted of one gross immorality.